

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 445

LAKE TANKERS CORPORATION, PETITIONER,

vs.

LILLIAN M. HENN, ADMINISTRATRIX

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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[fol.1]

[File endorsement omitted]

**IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK**

Adm. 183-206

PETITION OF LAKE TANKERS CORPORATION IN A CAUSE OF
EXONERATION FROM OR LIMITATION OF LIABILITY, CIVIL AND
MARITIME—Filed October 6, 1954

First: The petitioner is now and was at the times herein-after mentioned a Delaware corporation having an office for the transaction of business at 21 West Street, New York, N. Y., within this District, and was owner of the tug EASTERN CITIES and the barge L.T.C. No. 38.

Second: The EASTERN CITIES is a steel tug of 146 gross tons and 98 net tons register, 81.1 feet long, 24 feet beam, built in 1943. The L.T.C. No. 38 is a steel tank barge 229.5 feet long and 42.8 feet beam, without motive power of her own. Petitioner used due diligence to make said vessels seaworthy and at the time of the loss hereinafter set forth, and at and prior to the commencement of the voyage upon which said loss occurred, they were tight, staunch, strong, fully manned, equipped and supplied, and in all respects seaworthy and fit for the services in which they were engaged.

Third: On July 9, 1954, the EASTERN CITIES sailed from Perth Amboy, New Jersey, on a voyage to Ogdensburg, New York, via the Hudson River, the New York State Barge Canal and Lake Ontario, having No. 38 in tow laden [fol. 2] with a cargo of kerosene in bulk. She was under command of a competent and experienced master and was fully manned by a crew of competent and experienced licensed officers and unlicensed personnel. About 12:50 a.m. July 10, 1954, the EASTERN CITIES was proceeding up the Hudson River about in mid-channel below Esopus Meadows Light. The weather was clear and dark, wind light, current ebb. She was securely fastened to No. 38 and was pushing No. 38 ahead of her. Both vessels were exhibiting regulation navigation lights. As the EASTERN CITIES approached the bend in the Hudson River marked by

Esopus Meadows Light the green side light of a vessel, which proved to be the yacht **BLACK STONE**, emerged from behind Esopus Meadows Light. This light was kept under observation and in a short time a red light and a white light also appeared. The **EASTERN CITIES** sounded a one-blast whistle signal and the **BLACK STONE** appeared to veer to her right partially shutting out her green light. Thereafter she appeared to veer to her left, reopening her green light fully, and the **EASTERN CITIES** immediately sounded several short blasts of her whistle and immediately put her engines full speed astern. The **BLACK STONE** continued on at undiminished speed without sounding any whistle signal and although the **EASTERN CITIES** brought herself and No. 38 practically to a stop the **BLACK STONE** collided with the bow of No. 38. The collision occurred about 12:50 a.m. July 10, 1954, about in mid-channel below Esopus Meadows Light. [fol. 3] The **BLACK STONE** overturned. Two men boarded No. 38 directly from the **BLACK STONE** and others on the **BLACK STONE** went into the water. One of these emerged in the space between the bow of the **EASTERN CITIES** and the stern of No. 38. He was quickly extricated and immediately thereafter the **EASTERN CITIES** cast off from No. 38, directed her to anchor, which she did, and turned about and proceeded down river, playing her searchlight on the water searching for other persons who might be in the water. Seven persons were picked up in the course of this search. One man was reported to be missing. The search for him was continued for a considerable time but without success and he was not found. The **BLACK STONE**, floating largely submerged, was taken in tow but soon sank and the **EASTERN CITIES**, with ten survivors on board, returned to Poughkeepsie and landed the ten survivors at the Day Line pier where they were met by ambulances. Thereafter the **EASTERN CITIES** continued her voyage and arrived at Ogdensburg, New York, on July 14, 1954, where the voyage ended.

Fourth: The aforesaid collision and loss of life and personal injuries and the loss of the **BLACK STONE** were not caused or contributed to by any fault, neglect, design or want of care on the part of petitioner, or the **EASTERN CITIES** or No. 38, or of anyone for whom petitioner may be responsible, but were due solely to the negligence of Clyde W.

Roan, and his yacht **BLACK STONE**, and possibly others whose identities are unknown to petitioner.

[fol. 4] Fifth: The aforesaid collision and loss on July 10, 1954, and the loss of life, damage and destruction resulting therefrom or consequent thereupon, were occasioned and incurred without the privity or knowledge of petitioner or of the master of the **EASTERN CITIES** or of the superintendent or managing agent of petitioner or of any of them at or prior to the commencement of the voyage upon which the **EASTERN CITIES** was then engaged.

Sixth: As a result of the aforesaid occurrences, one passenger of the **BLACK STONE** is thought to have lost his life, others sustained personal injuries and the **BLACK STONE** became a total loss. At the present time petitioner does not know the actual total amount of the claims that are or may be made for loss of life, injuries, and other losses and damages that may have been sustained.

On or about July 19, 1954, an action was commenced in the Supreme Court of the State of New York, Ulster County, by Clyde W. Roan, Robert E. Cruz, John E. Strong and Charles A. Carlson against petitioner to recover damages alleged to have been sustained as a result of the collision aforesaid. Plaintiff Roan claims damages in the amount of \$7,500 for the loss of the **BLACK STONE** and other personal property, and \$25,000 damages for personal injuries; plaintiff Cruz claims \$25,000 damages for personal injuries; plaintiff Strong claims \$50,000 damages for personal injuries, and plaintiff Carlson claims \$50,000 damages for personal injuries. The attorney for the plaintiffs is Michael Nardone, Esq., Highland, N. Y.

[fol. 5] On or about September 22, 1954, an action was commenced in the Supreme Court of the State of New York, Ulster County, by Lillian M. Henn, as administratrix of the estate of Robert C. Henn, against petitioner and Clyde Roan, to recover damages for the alleged death of Robert C. Henn, claimed in said complaint to have been caused by the collision aforesaid. In this action plaintiff claims damages in the amount of \$500,000. Attorneys for the plaintiff are Rosen & Rosen, 11 Market Street, Poughkeepsie, New York.

Petitioner expects that other claims may be made and that other suits or actions may be commenced against it by

persons claiming to have sustained damages and injuries upon the aforesaid voyage.

Seventh: This petition is filed within six months after the date of the aforesaid loss and within six months after petitioner received the first written notice of claim from any claimant.

Eighth: The voyage upon which the EASTERN CITIES was engaged at the times herein mentioned terminated on July 14, 1954, at Ogdensburg, N.Y. Her value at such time and place did not exceed the sum of \$110,000.

The pending freight on the voyage was \$8542.21. Petitioner is informed and believes that the entire aggregate value of its interest in said tug EASTERN CITIES and her pending freight at the end of the voyage upon which the loss occurred does not exceed the sum of \$118,542.21. Subject to an appraisal of its interest upon a reference, petitioner offers an interim stipulation for value in the sum of \$118,542.21, said sum being not less than the aggregate [fol. 6] value of petitioner's interest in said tug and her pending freight at the termination of the voyage on which she was engaged at the time of the loss aforesaid.

Ninth: There are no demands, unsatisfied liens or claims of liens against the EASTERN CITIES, her engines, etc., or her pending freight, or any suits or actions pending thereon so far as is known to petitioner except as set forth above.

Tenth: Petitioner claims exemption from liability for the losses, damages, injuries and destruction occasioned or incurred by or resulting from the aforesaid collision and losses and for the claims for damages that have been or may hereafter be made, and petitioner alleges that it has valid defenses thereto on the facts and on the law. Petitioner further claims the benefit of the limitation of liability as provided in the Revised Statutes of the United States, and of the various statutes supplementary thereto and amendatory thereof, and to that end petitioner is ready and willing to give a stipulation for the payment into Court of the amount or value of its interest in said tug EASTERN CITIES and her pending freight and such additional interest as may be appropriate, whenever the same shall be ordered by the Court as provided by the aforesaid statutes and by General Rules 51 and 54 in Admiralty and by the rules and practices of this Honorable Court.

Eleventh: And singular the premises are true, and within the admiralty and maritime jurisdiction of this Honorable Court.

[fol 7] WHEREFORE petitioner prays:

1. That this Court cause due appraisement to be made of the amount or value of petitioner's interest in tug EASTERN CITIES and her pending freight at the end of the voyage above described.

2. That the Court make an order directing petitioner to file a stipulation to be approved by the Court for the payment into Court of the amount or value of petitioner's interest whenever the Court shall so order.

3. That the Court make an order directing the issuance of a monition to all persons claiming damages for any and all losses, damages, injuries or destruction done, occasioned, sustained or incurred by or resulting from the aforesaid collision, or in any way consequent thereupon, or during the voyage upon which the tug EASTERN CITIES was then engaged, citing them to appear as directed in said order and make due proof of their respective claims, and also to appear and answer the allegations of this petition, according to law and the practice of this Court, on or before a certain time to be fixed by the monition.

4. That the Court make an order directing that upon the giving of such stipulation as may be determined to be proper, or of an interim stipulation for the payment into Court of the amount of petitioner's interest, an injunction shall issue restraining the prosecution of any and all suits, actions and proceedings already begun to recover damages arising out of, occasioned by, or consequent upon the aforesaid accident as set forth in this petition or during the voyage upon which the tug EASTERN CITIES was then engaged and the commencement or prosecution hereafter of any suit, action or legal proceeding of any nature or description whatsoever, except in the present proceeding, against petitioner or its agents or representative or against tug EASTERN CITIES, her engines, etc., in respect of any claim or claims arising out of the aforesaid voyage and the aforesaid accident.

5. That the Court in this proceeding will adjudge that

the petitioner is not liable to any extent for any loss, damage, injury or destruction, or for any claim whatsoever in any way arising from or in consequence of the aforesaid voyage; or if petitioner shall be adjudged liable, then that such liability be limited to the amount or value of petitioner's interest in tug EASTERN CITIES and her pending freight, as aforesaid, at the end of the voyage on which she was engaged at the time of said accident, and that petitioner be discharged therefrom upon the surrender of such interest, and that the money surrendered, paid, or secured to be paid as aforesaid, be divided pro-rata according to the hereinabove mentioned statutes among such claimants as may duly prove their claims in accordance with the provisions of the order hereinabove prayed for, saving to all [fol. 8] parties any priorities to which they may be legally entitled, and that a decree may be entered discharging petitioner from all further liability.

6. That petitioner may have such other and further relief as the justice of the cause may require.

Burlingham, Hupper & Kennedy, Proctors for Petitioner

[fol. 9] *Duly sworn to by Edward K. Bachman, Jurat omitted in printing.*

[fol. 10] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

Ad. 183-206

In the Matter of the Petition of LAKE TANKERS CORPORATION,
for Exoneration from or Limitation of Liability.

ORDER FOR INTERIM STIPULATION—October 6, 1954

A petition for exoneration from or limitation of liability having been filed by Lake Tankers Corporation, and said petitioner having prayed for an appraisal of its interest in

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tug EASTERN CITIES and her pending freight and for leave to file a stipulation for the amount of said appraised value, or an *interim* stipulation pending such appraisal by a Commissioner to be appointed by this Court; and it appearing from the affidavits of Robert B. Mitchell, Jr., Charles F. Kellers, and H. S. Woodman, all sworn to on the 30th day of September, 1954, heretofore filed herein that the aggregate value of petitioner's interest in tug EASTERN CITIES and her pending freight does not exceed the sum of \$118,542.21.

Now, on motion of Burlingham, Hupper & Kennedy, proctors for petitioner, it is

Ordered that the petitioner file herein an *interim* stipulation for the value of its interest in said tug EASTERN CITIES and her pending freight in the sum of \$118,542.21, with interest according to Supreme Court Admiralty Rule 51, and it is further

Ordered that any party may apply to have the amount of said stipulation increased or diminished, as the case may be, upon the filing of the report of a Commissioner appointed to appraise the amount or value of petitioner's interest in said vessel and her pending freight, or upon the ultimate determination by the Court of exceptions to the [fol. 11] Commissioner's said report.

S. At New York, N. Y., in said Southern District on October 6th, 1954.

Archie O. Dawson, U.S.D.J.

[fol. 12] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

INTERIM STIPULATION—Filed October 8, 1954

Whereas Lake Tankers Corporation has instituted a proceeding in this Court for limitation of liability, if any, in respect of a collision which occurred between barge L.T.C.

No. 38 in tow of tug EASTERN CITIES and the yacht BLACK STONE on July 10, 1954, the facts of which are more particularly set forth in the petition filed herein on October 5, 1954, or for any other matter arising during the course of the voyage upon which the tug EASTERN CITIES was engaged at the time of collision, in which petitioner prays, among other things, that the Court will cause due appraisalment to be made of the amount or value of its interest in tug EASTERN CITIES and her pending freight upon a reference to be ordered herein and that a monition may issue to all persons claiming damages for any and all loss, damage, injury or destruction sustained, occasioned or incurred by or resulting from said collision or during the course of the voyage upon which the EASTERN CITIES was then engaged, citing them to appear before this Court and to make due proof of their respective claims and to answer the petition herein; and that an injunction issue restraining the prosecution of any and all actions, suits or proceedings already begun and the commencement or prosecution thereafter of any action or legal proceeding against petitioner's tug EASTERN CITIES [fol. 13] except under and in pursuance of the provisions of the monition to be issued herein; and

Whereas, petitioner wishes to prevent the further prosecution of any and all proceedings already instituted against it and against the EASTERN CITIES and her pending freight and the commencement or the prosecution hereafter of any and all suits, actions, or legal proceedings, of any nature or description whatsoever in any and all Courts and also wishes to provide an *interim* stipulation for value as security for claims pending the ascertainment by reference of the amount or value of the interest of the petitioner in tug EASTERN CITIES and her pending freight.

Now, therefore, in consideration of the premises The Federal Insurance Company, having an office and place of business at 90 John Street, Borough of Manhattan, City of New York, hereby undertakes in the sum of One Hundred eighteen thousand five hundred and forty-two dollars and twenty-one cents (\$118,542.21), with interest thereon from October 1954, that petitioner will pay into the registry of the Court within ten (10) days after the entry of an order confirming the report of a Commissioner to be appointed

to appraise the amount or value of petitioner's interest in tug EASTERN CITIES and her pending freight, if any, the amount or value of such interest as thus ascertained or will file in this proceeding a bond or stipulation for value in the usual form with surety in such amount; and that pending payment into Court of such amount or the giving of a stipulation for value thereof, this stipulation shall stand as security for all claims in said limitation proceeding.

Said The Federal Insurance Company hereby submits itself to the jurisdiction of this Court and agrees to abide by [fol. 14] all orders and decrees of the Court, intermediate or final, or to pay the amount awarded by the final decree, rendered by this Court or by an Appellate Court if an appeal intervene, with interest as aforesaid, unless the amount or value of petitioner's interest in said tug EASTERN CITIES and her pending freight, shall be paid into Court by petitioner or a stipulation for value therefor shall be given as aforesaid in the meantime, in which event this stipulation shall be void.

Dated: New York, N. Y., October 5th, 1954.

Lake Tankers Corporation. By: Edward K. Bachman, Vice President, The Federal Insurance Company, By: Arthur A. Kuhne, Assistant Secretary.

Attest:

Theodore G. Lindsay, Assistant Secretary.

And:

Adelaide Natale, Attorney-in-fact.

Countersigned:

Chubb & Son, By: Charles G. Stacknik, Resident Agent—
New York, N. Y.

[fols. 15-15a] *Duly sworn to by Edward K. Bachman. Jurat omitted in printing.*

[fol. 15b] Approved: 10/8/54. William V. Connell, Clerk.

[fol. 16] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

ORDER FOR MONITION AND INJUNCTION—October 8, 1954

A petition having been filed herein on October 6, 1954, by Lake Tankers Corporation, claiming the benefit of the limitation of liability provided for in the Revised Statutes of the United States and the various statutes supplementary thereto and amendatory thereof, and also contesting the liability of petitioner independently of the limitation of liability claimed under said statutes, for any and all losses, damages, injuries and destruction done, occasioned or incurred by or resulting from the collision set forth in the petition, which occurred on July 10, 1954, or at any time during the voyage upon which petitioner's vessels were then engaged; and said petition also stating the facts and circumstances upon which said exoneration from and limitation of liability are claimed; and on reading and filing the affidavits of Robert B. Mitchell, Jr., Charles F. Kellers and H. S. Woodman, all sworn to September 30, 1954, as to the value of tug EASTERN CITIES and her pending freight, and the *interim* stipulation for value executed by Lake Tankers Corporation and The Federal Insurance Company in the sum of \$118,542.21 with interest from October 5, 1954; and said stipulation having been approved by the Court and files herein on or about October 8, 1954, and it appearing that claims have been made and actions at law have been [fol. 17] begun against petitioner for losses, damages, injuries and destruction alleged to have occurred in consequence of the aforesaid collision;

Now, on motion of Burlingham, Hupper & Kennedy, proctors for petitioner, it is:

Ordered that a monition issue out of and under the seal of this Court citing all persons claiming damages for any and all losses, damages, injuries or destruction done, occasioned or incurred by or arising out of, or consequent upon, said collision of July 10, 1954, or arising during the

voyage upon which petitioner's vessels were then engaged, and all persons having any claims against the said tug EASTERN CITIES, her engines, equipment, etc. or her pending freight to appear before this Court and file due proof of their respective claims, under oath, with the Clerk of this Court at the United States Court House, Foley Square, New York, 7, N. Y., on or before November 26, 1954, at 10:00 o'clock in the forenoon, and to serve upon or mail to the proctors for the petitioner a copy thereof, or be defaulted, subject to the right of any person to controvert or question the same, with liberty also to any person or persons claiming damages as aforesaid who shall have presented his or their claims to the Clerk of this Court to answer said petition; and it is further

Ordered that public notice of said monition be given as provided by United States Supreme Court Admiralty Rule 51, by publication of a notice in the New York Law Journal, a newspaper published in the Borough of Manhattan, City, County and State of New York, once in each week for four successive weeks before the return date of said monition, and that petitioner, not later than the day of the second publication, shall mail a copy of said notice to every person [fol. 18] known to have asserted any claim against the vessel or petitioner and to his proctor or attorney, if known; and it is further

Ordered that the beginning or prosecution of any and all suits, actions or proceedings of any nature or description whatsoever against petitioner herein and/or against tug EASTERN CITIES, except in the present proceeding, in respect of any claim arising out of, occasioned by, consequent upon or connected with the aforesaid occurrences arising during the voyage upon which the EASTERN CITIES was then engaged, be and they hereby are stayed and restrained until the hearing and determination of this proceeding; and it is further

Ordered that service of this order as a restraining order be made within this district in the usual manner, or, in any other district, by the United States Marshal for such district, by delivering a copy of this order to the person or persons to be restrained, or to his or their respective proctors or attorneys.

At New York, N. Y. in said Southern District on October 8th, 1954.

Archie O. Dawson, U.S.D.J.

Burlingham, Hupper & Kennedy, Proctors for Petitioner,
27 William Street, New York City 5.

[fol. 19]. [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

NOTICE OF MOTIONS—Filed November 8, 1954

SHEs:

Please take notice that upon the annexed exceptions to the petition herein and the affidavit of N. LeVan Haver, sworn to the 2nd day of November 1954, the undersigned, proctors for claimant Lillian M. Henn as Administratrix of the Goods, Chattels and Credits of Robert C. Henn, Deceased, appearing especially herein, will move this Court at a stated term for the hearing of motions to be held at the United States Court House, Foley Square, New York, N.Y. on the 12th day of November 1954 at 10 o'clock in the forenoon or as soon thereafter as counsel may be heard for (1) an order sustaining said exceptions, (2) a final decree dismissing the petition herein and vacating the injunction heretofore entered on October 8th, 1954; and they will ask for such other and further relief as to the Court may seem just and proper in the premises.

Dated Poughkeepsie, N.Y., November 4th, 1954.

Rosen & Rosen, Proctors for Claimant, Lillian M.
Henn, Appearing Specially, 11 Market Street,
Poughkeepsie, New York.

To: Burlingham, Hupper & Kennedy, Esqs., Proctors for
Petitioner, 27 William Street, New York, N.Y.

[fol. 20]

[Title omitted]

CLAIMANT'S EXCEPTIONS TO PETITION

The claimant Lillian M. Henn, as Administratrix of the Goods, Chattels and Credits of Robert C. Henn, Deceased, appearing specially herein, hereby excepts to the petition herein upon the following grounds:

1. In that although the petition was filed by petitioner Lake Tankers Corporation, as owner of the tank barge L.T.C. No. 38 which is described in detail therein and with respect to which petitioner alleges that it exercised due diligence to make said tank barge seaworthy and that it was tight, staunch, strong, fully manned, equipped and supplied by petitioner and in all respects seaworthy and fit for the services in which it was engaged, and further alleges that the collision and loss of life and personal injuries, described in said petition, were not caused or contributed to by any fault, neglect, design or want of care on the part of petitioner or said barge L.T.C. No. 38, said petition fails to allege the claimed value of petitioner's interest in said barge and her pending freight and further fails to allege that, subject to an appraisal, petitioner offers an ad interim stipulation for value for the aggregate value of its interest in said barge and her pending freight, and further fails to allege that petitioner is ready and willing, [fol. 21] whenever ordered by the Court, to give a stipulation for the payment into Court of the amount or value of its interest in said barge and her pending freight.

2. In that although petitioner seeks exoneration and limitation from all liability, as owner of the barge L.T.C. No. 38, it has failed to surrender or offer to surrender, as required by the applicable Statutes and Rules, the vessel with respect to which such exoneration and limitation are sought and, therefore, such exemption cannot be claimed in this proceeding.

Rosen & Rosen, Proctors for Claimant, Lillian M. Henn, Appearing Specially, 11 Market Street, Poughkeepsie, New York

[fol. 22]

[Title omitted]

AFFIDAVIT OF N. LEVAN HAVER

STATE OF NEW YORK,
County of Ulster, ss:

N. LeVan Haver, being duly sworn, deposes and says:

That he is of counsel with Rosen & Rosen, Esqs. proctors for claimant Lillian M. Henn as Administratrix of the Estate of Robert C. Henn Deceased in the above entitled matter and is familiar therein. This affidavit is submitted in support of the exceptions of Lillian M. Henn, appearing specially, to the petition herein.

Robert C. Henn lost his life on July 10th, 1954 and left him surviving his said widow Lillian M. Henn and three daughters of ages nine, five and three years respectively. At the time of his death he was thirty-six years of age, was in good health and gainfully employed.

At about 12:45 A.M. on July 10th, 1954 said Robert C. Henn was lawfully a passenger on the motor yacht BLACKSTONE and was proceeding in the Hudson River when it was collided with by the oil barge L.T.C. No. 38, in tow of the diesel tug EASTERN CITIES, south of Esopus Meadows Light [fol. 23] House in the County of Ulster while the said motor yacht BLACKSTONE was proceeding in a generally southerly direction and the tug EASTERN CITIES and barge L.T.C. No. 38 were proceeding in a generally northerly direction in the said river.

On or about September 22nd, 1954 suit was instituted in Supreme Court for the State of New York, Ulster County, by Lillian M. Henn, as administratrix of the Estate of Robert C. Henn Deceased, represented by Rosen & Rosen, Esqs. against Lake Tankers Corporation, as owner of the tug EASTERN CITIES and tank barge L.T.C. No. 38 and one Clyde Roan, as owner of the yacht BLACKSTONE, to recover damages for the death of said Robert C. Henn, caused by the collision aforesaid and claiming damages in the sum of \$500,000. A true and complete copy of said complaint is annexed to this affidavit, made a part hereof and marked Exhibit A.

In said complaint it was alleged, among other things, and particularly in paragraphs 4, 7 and 9 thereof as follows:

"4. That at all the times herein concerned the defendant, Lake Tankers Corporation, owned, operated, managed and controlled the diesel tug EASTERN CITIES and the oil barge L.T.C. #38.

7. That upon information and belief, that heretofore and on July 10th, 1954, at about 12:45 A.M., the said Robert C. Henn was lawfully and prudently a passenger on the motor yacht BLACKSTONE, which vessel was proceeding in a general southerly direction near the center of the Hudson River south of Esopus Meadows Light House in the County of Ulster, and State of New York; and the said diesel tug EASTERN CITIES was pushing the oil barge L.T.C. No. 38 in a general northerly direction on the said River; and at said time and place, and solely through the negligence of Lake Tankers Corporation, by its agents, servants, employees, officers and crew in charge of the operation, management and control of said tug and barge, and of the defendant Clyde Roan, said vessel BLACKSTONE and the said barge as pushed by the said diesel tug were caused to collide and come together."

9. That the death of said Robert C. Henn was due solely through the carelessness and negligence of the defendants herein."

It will be noted that there was pleaded ownership, operation and control of both the diesel tug EASTERN CITIES and the oil barge L.T.C. No. 38 and that the death of Robert C. Henn was caused "through the negligence of Lake Tankers Corporation, by its agents, servants, employees, officers and crew in charge of the operation, management and control of said tug and barge".

The within limitation proceeding was instituted by the filing on October 6th, 1954 of the petition of Lake Tankers Corporation and in which it seeks exoneration from and

limitation of all liability. A copy of the petition is annexed hereto, made a part hereof and marked Exhibit B. The usual restraining order, based on the said petition, issued and particularly referred to "petitioner's vessels". It enjoined the prosecution of claimant's State Court action against petitioner. It will be noted that the petition is filed on behalf of Lake Tankers Corporation not only as owner of the tug EASTERN CITIES but also as owner of the tank barge L.T.C. No. 38:

[fol. 25] "First: The petitioner is now and was at the times hereinafter mentioned a Delaware corporation having an office for the transaction of business at 21 West Street, New York, N. Y., within this District, and was owner of the tug EASTERN CITIES and the barge L.T.C. No. 38."

By the Second Article of the petition, petitioner makes allegations of its due diligence with respect not only to the tug EASTERN CITIES but to the tank barge L.T.C. No. 38 which is described in the petition as is the tug EASTERN CITIES:

"Second: The EASTERN CITIES is a steel tug of 146 gross tons and 98 net tons register, 81.1 feet long, 24 feet beam, built in 1943. The L.T.C. No. 38 is a steel tank barge 229.5 feet long and 42.8 feet beam, without motive power of her own. Petitioner used diligence to make said vessels seaworthy and at the time of the loss hereinafter set forth, and at and prior to the commencement of the voyage upon which said loss occurred, they were tight, staunch, strong, fully manner, equipped and supplied, and in all respects seaworthy and fit for the services in which they were engaged."

By Article Third of the petition it is alleged among other things, with respect to the tug EASTERN CITIES and the barge L.T.C. 38: "both vessels were exhibiting regulation navigation lights".

By Article Fourth of the petition it is alleged that there was no fault, neglect, design or want of care on the part of the petitioner "or the EASTERN CITIES or No. 38, or of anyone for whom petitioner may be responsible."

Nevertheless, although the suit instituted in Supreme Court of the State of New York, Ulster County alleged [fol. 26] operation and control of the oil barge L.T.C. No. 38 in Lake Tankers Corporation and negligence on the part of said defendant with respect to the said barge, as well as the tug, and though the petition was filed herein by Lake Tankers Corporation, as owner of the barge, as well as the tug, and petitioner has also alleged its exercise of due diligence with respect to the barge, and further has alleged that it was exhibiting regulation navigation lights, which is denied by the claimant Lillian M. Henn and will be one issue for trial between the parties, the petition herein, in Article Eight, makes no reference whatever to the value of the barge L.T.C. No. 38 and her pending freight for the voyage on which she was then engaged. It recites only that the value of the tug EASTERN CITIES was \$110,000 and that her pending freight was \$8,542.21 and petitioner states that it is informed and believes "that the entire aggregate value of its interest in said tug EASTERN CITIES and her pending freight at the end of the voyage upon which the loss occurred does not exceed the sum of \$118,542.21", for which amount it offers an ad interim stipulation for value, "said sum being not less than the aggregate value of petitioner's interest in said tug and her pending freight." Further, though by Article Ninth petitioner alleges that there are no demands, claims or unsatisfied liens against the tug EASTERN CITIES or her pending freight, "or any suits or actions pending thereon so far as is known to petitioner except as set forth above", petitioner fails to recite in Article Sixth of its petition that the suit which was instituted by Lillian M. Henn, as Administratrix of the Estate of Robert C. Henn, Deceased, against the petitioner made allegations of operation and control of the oil barge L.T.C. No. 38 in petitioner and specifically charged petitioner, its [fol. 27] agents, servants and employees with fault as owner and operator of the said barge.

Accordingly, it is clear that in seeking, by this proceeding, exoneration from or limitation of *all* liability which it might have to the claimant Lillian M. Henn, the petitioner has signally failed to comply with the Statutes and applicable

Admiralty Rules of the Supreme Court of the United States. Though it has recognized the allegations of fault made in the State Court action by said Lillian M. Henn with respect to the barge L.T.C. No. 38, and has filed its petition as owner of the said barge it has failed to offer an ad interim stipulation for value on behalf of the barge and her pending freight or, in fact, to file such ad interim stipulation for value on behalf of the barge and her pending freight or, in fact, to file such ad interim stipulation; but has sought by merely posting ad interim security on behalf of the tug EASTERN CITIES *to have it decreed that it is entitled to exoneration from and limitation of all liability.* Further it has improperly obtained injunctive relief against the claimant with respect to the State Court litigation.

Accordingly it is respectfully submitted that by reason of the petitioner's failure herein, claimant's exceptions to the petition should be sustained, the petition herein should be dismissed and the restraining order heretofore entered on October 8th, 1954 should be vacated; and it is further respectfully prayed that claimant Lillian M. Henn, may have such other and further relief as to the Court may seem just and proper in the premises.

N. LeVan Haver.

Sworn to before me this 2nd day of November 1954.

Charles H. Gaffney, Notary Public in the State of New York, resident in and for Ulster County, Commission expires March 30, 1956.

[fol. 28]

EXHIBIT "A" TO AFFIDAVIT

SUPREME COURT, ULSTER COUNTY

LILLIAN M. HENN, as Administratrix of the Goods, Chattels
and Credits of Robert C. Henn, deceased, Plaintiff,

against

LAKE TANKERS CORPORATION and CLYDE ROAN, Defendants

The plaintiff, by Rosen and Rosen, her attorneys, complaining of the defendants herein, alleges:

1. That at all the times herein concerned the plaintiff was a resident of the State of New York and that the decedent, Robert C. Henn was a resident of the County of Dutchess and State of New York.

2. That at all the times herein concerned Clyde Roan was a resident of the County of Ulster and State of New York and was the owner and operator of and in control of the motor yacht BLACKSTONE, proceeding a general southerly direction.

3. That at all the times herein concerned the defendant, Lake Tankers Corporation was a foreign corporation, organized and existing under and by virtue of the laws of the State of Delaware with its principal place of business at 100 West 10th Street, Wilmington, Delaware, and maintaining an office for the purpose of doing business in the State of New York at 21 West Street, New York, New York, and as such, engaged in the marine transportation business.

4. That at all the times herein concerned the defendant, Lakes Tanker Corporation, owned, operated, managed and controlled the diesel tug, EASTERN CITIES and the oil barge, L.T.C. #38.

[fol. 29] 5. That at all the times herein concerned the Hudson River, at a point a short distance southerly of Esopus Meadows Light House, in the County of Ulster and State of New York, was a well traveled, navigable river and public highway of the State of New York.

6. That Robert C. Henn, the above decedent, died intestate upon information and belief, in Ulster County, in the

State of New York, on July 10th, 1954; and thereafter on September 20, 1954, Letters of Administration of the goods, chattels and credits of said Robert C. Henn, deceased were duly issued to the plaintiff, Lillian M. Henn, by the Surrogate's Court of the County of Dutchess, and State of New York, and that said Lillian M. Henn has duly qualified as such Administratrix and is still acting as such.

7. That upon information and belief, that heretofore and on July 10th, 1954, at about 12:45 a.m., the said Robert C. Henn was lawfully and prudently a passenger on the motor yacht BLACKSTONE, which vessel was proceeding in a general southerly direction near the center of the Hudson River south of Esopus Meadows Light House in the County of Ulster, and State of New York; and the said diesel tug EASTERN CITIES was pushing the oil barge LTC #38 in a general northerly direction on the said River; and at said time and place, and solely through the negligence of Lake Tankers Corporation, by its agents, servants, employees, officers and crew in charge of the operation, management and control of said tug and barge, and of the defendant Clyde Roan, said vessel BLACKSTONE and the said barge as pushed by the said diesel tug were caused to collide and come together.

8. That by reason of the foregoing accident and collision the said Robert C. Henn did sustain injuries resulting in his death by drowning at said time and place.

[fol. 30] 9. That the death of said Robert C. Henn was due solely through the carelessness and negligence of the defendants herein.

10. That the said Robert C. Henn, deceased, left him surviving his wife, Lillian M. Henn, the Administratrix herein; his daughter, Stephanie C. Henn, aged 9 years; his daughter, Victoria Linda Henn, aged 5 years; and his daughter, Sharon Virginia Henn, aged 3 years, as his next of kin; and at the time of his death the decedent, Robert C. Henn was 36 years of age and prior thereto was in good health and gainfully employed; and that by reason of the foregoing, the aforementioned next of kin have been damaged by his death, all in the sum of Five Hundred Thousand Dollars (\$500,000.00).

Wherefore, plaintiff demands judgment against the defendants herein the amount of Five Hundred Thousand

Dollars (\$500,000.00), together with the costs and disbursements of this action.

Rosen & Rosen, Attorneys for Plaintiff, Office & P.O.
Address 11 Market Street, Poughkeepsie, New
York.

Exhibit B (Petition) omitted. Printed side page 1 ante.

[fol. 31] IN UNITED STATES DISTRICT COURT

MEMORANDUM DECISION OF RYAN, D. J., DENYING MOTION TO
DISMISS PETITION—DECEMBER 16, 1954

Movant, appearing specially, asks that the petition for limitation be dismissed and the order staying prosecution of her claim be vacated unless petitioner surrender its interest in barge L.T.C. No. 38.

Movant's intestate was a passenger on a yacht which collided with the barge while in tow of the tug Eastern Cities on the night of July 10, 1954. Prior suit against petitioner in the state court for this alleged wrongful death has been stayed.

[fol. 32] The petition herein admits ownership and control of both barge and tug, alleges their seaworthiness, denies negligence and offers interim stipulation of value of tug only. The petition prays that if liability be determined adversely it be limited to petitioner's interest in the tug and that any suit "against petitioner . . . or against tug Eastern Cities" be stayed. The order on motion directed filing of all claims against the tug arising from the collision; it stayed all suits against petitioner and/or tug Eastern Cities.

Although movant has not filed a claim in these limitation proceedings she may except to the petition. *E. I. DuPont v. Bentley*, 19 F. 2d 354. Exception has been taken because the barge has not been surrendered and no interim stipulation filed for her value.

The dissimilar conclusions reached in the cases dealing with the necessity of surrender of all vessels involved in an

accident demonstrate that the "turning point in all of them is, what are the real facts controlling in them." *The Alvah H. Boushell*, 38 F. 2d 980, 981. It was there held that where the inactive tug contributed to the collision by its very failure to act in aid of the active tug, both were considered as one vessel—"the unit to be surrendered to justify a limitation of liability" (p. 982). In *The Columbia*, 73 Fed. 226, a barge having no motive power was ordered surrendered since it, with the tug, became one vessel for the purposes of the voyage. In both *Liverpool Nav. Co. v. Brooklyn Terminal*, 251 U. S. 48, 53 (the court noting, "if you surrender the offending vessel you are free"), and in the *Transfer No. 21*, 248 Fed. 459, 461 (the court noting, "a tow without motive power, alongside a tug and moved by it, cannot be at fault"), there was a factual finding that the floats which were not surrendered were or could not have been contributing causes of the collision. There is no real conflict in the law applicable; the different results reached arise from the facts present.

[fol. 33] The collision here occurred at night. Movant claims that a contributing cause was improper lighting of the barge. The petition alleges that both vessels were exhibiting regulation navigation lights. A factual issue has been presented for trial. If the barge was not equipped with proper lights, as movant asserts, it cannot now be said that she was not an offending vessel merely because she was without motive power and under the control of the tug. *The Asfalto*, 45 F. 2d. 857. "When two vessels of the same owner contribute to a disaster, the owner may not limit liability without surrendering his interest in both vessels." *United States v. The Australia Star*, 172 F. 2d 472, 478 (C. A. 2, 1949).

Whether the barge was a contributing factor to the collision has been put in issue by the allegations of the petition and the contention of the movant on this motion.

Motion to dismiss the petition, however, is denied. Petitioner may file an interim stipulation for the value of the barge in which event the order restraining suits against it and/or the Eastern Cities will remain in force; upon failure to do so within 10 days the order will be modified so as

to restrain suits outside of this proceeding only with respect to those brought against the Eastern Cities. Movant shall have twenty days from the date on which the stipulation is filed and approved to file her claim in this proceeding.

Settle order.

Dec. 16, 1954.

Sylvester J. Ryan, *U. S. D. J.*

[fol. 34] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

ORDER DENYING MOTION TO DISMISS THE PETITION AND FOR
FILING OF AN AD INTERIM STIPULATION, ETC.—January 26,
1955

Claimant, Lillian M. Henn, as Administratrix of the goods, chattels and credits of Robert C. Henn deceased, having appeared specially herein and having moved at a Stated Term for the hearing of motions on the 9th day of November 1954 for an order sustaining her exceptions to the petition herein and for a final decree dismissing the petition and vacating the restraining order heretofore entered on October 8th, 1954 and Rosen & Rosen, Esqs. by N. LeVan Haver, Esq. and Frank C. Mason, Esq. having appeared on behalf of claimant in support of the motion and Burlingham, Hupper & Kennedy, Esqs. by Eugene Underwood, Esq. having appeared on behalf of the petitioner in opposition thereto and due deliberation having been had, now on motion of Rosen & Rosen, proctors for claimant Lillian M. Henn, it is

Ordered that the motion to dismiss the petition herein is in all respects denied, and it is further

Ordered that within ten days after service of a copy of this order, with notice of entry thereof, upon petitioner's

proctors the petitioner may file for approval as to form and sufficiency of surety, an ad interim stipulation for the value of its interest in the barge L.T.C. No. 38, in which event the restraining order heretofore entered herein [fol. 35] on October 8th, 1954 will remain in full force and effect, and it is further

Ordered that in the event the petitioner shall fail to file for such approval the aforesaid ad interim stipulation within the prescribed ten day period, the restraining order entered on October 8th, 1954, thereupon shall be deemed, by the terms of this order, to be modified to the extent that it shall restrain suits outside of this proceeding only with respect to those brought against the tug EASTERN CITIES and/or petitioner as owner and operator of that vessel, and it is further

Ordered that claimant shall file her claim and answer herein within twenty days after the aforesaid ad interim stipulation shall have been filed and approved, or if such stipulation shall not have been filed within the prescribed period, the claimant shall file her claim and answer herein as against the tug EASTERN CITIES only within twenty days after petitioner's default in such filing.

Dated New York, N. Y., January 26th, 1955.

Sylvester J. Ryan, *U. S. D. J.*

[fol. 36]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

SUPPLEMENTAL AD INTERIM STIPULATION FOR VALUE ON
BEHALF OF BARGE LTC No. 38—Filed February 10, 1955

Whereas a petition was duly filed in the office of the Clerk of this Court on October 6, 1954, by Lake Tankers Corporation, as owner of tug EASTERN CITIES and barge L.T.C.

No. 38, for exoneration from or limitation of liability in respect of the collision between barge L.T.C. No. 38 in tow of tug EASTERN CITIES and yacht BLACKSTONE on July 10, 1954, and the subsequent sinking of yacht BLACKSTONE; the amount of its interest in said tug EASTERN CITIES and/or barge L.T.C. No. 38 after said collision and their freight and towage moneys then pending; and

Whereas by order of this Court entered herein on October 10, 1954, an interim stipulation for the value of tug EASTERN CITIES and her pending freight in the total amount of \$118,542.21 was approved and filed herein on October 8, 1954; and

Whereas an order was entered in the office of the Clerk of this Court on January 27, 1955, which, among other things, provided that within 10 days after the service of a copy of said order upon the proctors for petitioner, the petitioner shall file an additional interim stipulation for the value of barge L.T.C. No. 38 in order to prevent the modification of [fol. 37] the restraining order entered herein on October 8, 1954; and

Whereas the value of said barge L.T.C. No. 38 has been fixed by agreement for the purpose of bonding in this proceeding at the sum of \$165,000, with interest thereon from October 8, 1954, as appears by the stipulation at the foot hereof, the petitioner herein, as owner of barge L.T.C. No. 38, hereby consents and agrees that, if the claimants herein recover, a decree may be entered against it for an amount not exceeding the above-stated amount, with interest thereon from October 8, 1954, and that thereupon execution therefor may issue against it and its goods, chattels, lands and tenement or other real estate.

Now, therefore, the condition of this stipulation is such that if Lake Tankers Corporation, the petitioner herein, having its office and principal place of business at No. 21 West Street, in Borough of Manhattan, City, County and State of New York, shall abide by all orders and/or decrees of this Court and pay the amount awarded by the final decree entered herein by this Court and/or by an appellate court if an appeal intervene, with interest aforesaid, then

this stipulation shall be void, otherwise to remain in full force and virtue.

Dated: New York, N. Y.

February 7, 1955

Lake Tankers Corporation, By
Edward K. Bachman, Vice President.

Attest:

Alice E. Van Why, Secretary.

[fol. 38] *Duly sworn to by Edward K. Bachman. Jurat omitted in printing.*

APPROVAL OF STIPULATION—February 7, 1955

The value of barge L.T.C. NO. 38 is hereby fixed, for the purpose of bonding in this proceeding, at the sum of One hundred Sixty-Five thousand Dollars (\$165,000), with interest thereon from October 8, 1954, and the foregoing stipulation is approved as to form, amount and sufficiency of surety.

Dated: New York, N. Y. February 7th, 1955.

Rosen & Rosen, Proctor for Claimant

[fol. 39]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

CLAIM OF LILLIAN M. HENN—Filed March 1, 1955

And now comes Lillian M. Henn, as Administratrix of the goods, chattels and credits of Robert C. Henn, deceased and makes claim against the above named Lake Tankers

Corporation and the tug EASTERN CITIES and the barge L.T.C. No. 38 as follows:

That on the early morning of July 10th, 1954, the above named deceased Robert C. Henn was a passenger on board the motor yacht BLACKSTONE, which was proceeding in a generally southerly direction in the Hudson River between Kingston and Poughkeepsie, when the barge L.T.C. No. 38 in tow of the tug EASTERN CITIES, northbound, came into collision with the said yacht BLACKSTONE, as a result whereof the said yacht sank and the aforesaid Robert C. Henn was killed, without fault on his part and left him surviving his widow the said Lillian M. Henn and three minor children of ages nine years, five years and four years as his next of kin.

That the said collision was caused by and contributed to by the fault and negligence of those in charge of the said tug EASTERN CITIES and barge L.T.C. No. 38.

[fol. 40] That on September 20th, 1954 letters of administration of the goods, chattels and credits of said Robert C. Henn, deceased, were duly issued to the claimant Lillian M. Henn, by the Surrogate's Court of the County of Dutchess and State of New York, and that said Lillian M. Henn has duly qualified as such Administratrix and is still acting as such.

The said claimant is entitled to maintain an action and claim to recover damages for the death thus occasioned, and hereby claims \$250,000 as the amount of such damages, no part of which has been paid.

Rosen & Rosen, Proctors for Claimant, Office & P. O.
Address, 11 Market Street, Poughkeepsie, New
York.

[fol. 41] *Duly sworn to by Lillian M. Henn. Jurat omitted in printing.*

[fol. 42]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

ANSWER OF CLAIMANT—Filed March 1, 1955

Claimant, Lillian M. Henn, as Administratrix of the goods, chattels and credits of Robert C. Henn, deceased, by her proctors Rosen & Rosen, for her answer to the petition herein alleges on information and belief:

First: Denies that she has any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Article First of the petition.

Second: Denies that she has any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Article Second of the petition.

Third: Denies each and every allegation contained in Article Third of the petition, except as hereinafter specifically admitted or alleged.

Fourth: Denies each and every allegation contained in Article Fourth of the petition wherein it is alleged that the collision and resulting damages were not caused or contributed to by any fault, neglect, design or want of care on the part of petitioner or the tug EASTERN CITIES or the barge L.T.C. No. 38 or of any one for whom petitioner may be responsible.

[fol. 43] Fifth: Denies each and every allegation contained in Article Fifth of the petition.

Sixth: Denies that she has any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Article Sixth of the petition, except that she admits that on or about September 22nd, 1954 an action was commenced in Supreme Court of the State of New York, Ulster County by this claimant as Administratrix of the Estate of Robert C. Henn, deceased against petitioner, as owner and operator of the tug EASTERN CITIES and barge L.T.C. No. 38 and against Clyde Roan, as owner of the yacht BLACKSTONE, to recover damages for the death of Robert C. Henn, that in said complaint she

claimed damages in the amount of \$500,000 and that her attorneys are Rosen & Rosen, 11 Market Street, Poughkeepsie, New York.

Seventh: Denies that she has any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Article Seventh of the petition.

Eighth: Denies each and every allegation contained in Article Eighth of the petition.

Ninth: Denies that she has any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Article Ninth of the petition.

Tenth: Denies each and every allegation contained in Article Tenth of the petition.

Eleventh: Denies each and every allegation contained in Article Eleventh of the petition, except that she admits the [fol. 44] Admiralty and Maritime jurisdiction of the United States and of his Honorable Court.

FURTHER ANSWERING THE SAID PETITION CLAIMANT ALLEGES ON INFORMATION AND BELIEF THAT THE TRUE FACTS AND CIRCUMSTANCES WERE AS FOLLOWS:

Twelfth: On the early morning of July 10th, 1954 the above named deceased Robert C. Henn was a passenger on board the motor yacht BLACKSTONE, which was proceeding in a generally southerly direction in the Hudson River between Kingston and Poughkeepsie, when the barge L.T.C. No. 38 in tow of the tug EASTERN CITIES, northbound, came into collision with the said yacht BLACKSTONE as a result whereof the said yacht sank and the aforesaid Robert C. Henn was killed, leaving him surviving as his next of kin his widow, this claimant, and three minor children of ages nine years, five years and four years.

Thirteenth: That the aforesaid collision and loss of life of said Robert C. Henn was caused by and contributed to by the fault and negligence of petitioner and those in charge of its tug EASTERN CITIES and its barge L.T.C. No. 38 in that they failed to maintain a proper and efficient lookout, in that the tug failed to observe the yacht BLACKSTONE in due season and to take precautionary measures to avoid collision, in proceeding at an immoderate speed under the

circumstances, in failing to stop and reverse in time to avoid the collision, in running down the BLACKSTONE and causing the death of said Robert C. Henn, in that the barge L.T.C. No. 38 was improperly and inadequately lighted, in that prompt and efficient measures were not taken to rescue the said Robert C. Henn and in other respects which will be pointed out upon the trial of this action.

[fol. 45] Fourteenth: That all and singular the premises are true. °

Wherefore claimant prays that the petition herein be dismissed with costs and that her claim be allowed accordingly with interest and costs.

Rosen & Rosen, Proctors for Claimant, Office & P. O.
Address, 11 Market Street, Poughkeepsie, New
York.

[fol. 46] *Duly sworn to by Lillian M. Henn. Jurat omitted in printing.*

[fol. 47] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title Omitted]

NOTICE OF MOTIONS—Filed March 19, 1955

Please take notice that on all the pleadings and proceedings heretofore had herein and the annexed affidavit of Frank C. Mason sworn to the 14th day of March 1955 the undersigned will move this Court at a Stated Term for the hearing of motions to be held at the United States Court House, Foley Square, New York, N.Y. on the 24th day of March 1955 at 10:00 o'clock in the forenoon or soon thereafter as counsel can be heard, for an order vacating the restraining order heretofore entered herein on October 8th, 1954 with respect to the suit pending in the Supreme Court, State of New York, Ulster County on behalf of claimant Lillian M. Henn; as Administratrix of the Estate of

Robert C. Henn deceased against the petitioner herein and we will ask the Court for such other and further relief as may be just in the premises.

Dated: New York, N. Y., March 14th, 1955

Rosen & Rosen, Proctors for Claimant, Lillian M. Henn, Office & P. O. Address, 11 Market Street, Poughkeepsie, New York.

To: Burlingham, Hupper & Kennedy, Esqs., Proctors for Petitioner, 27 William Street, New York, N. Y.

[fol. 48] Joseph Giudice, Esq., Proctor Claimants, John W. VanWart, William F. Hughes, Robert D. McNutt, Robert E. Cruz, Albert H. Raymond, Jr., Ernest Cady and William V. Ratledge, 11 Market Street, Poughkeepsie, New York.

Michael Nardone, Proctors for Claimants Charles Carlson, Clyde W. Roan and John Stroug, Highland, New York.

[fol. 49] [Title omitted]

AFFIDAVIT OF FRANK C. MASON

STATE OF NEW YORK,

County of New York, ss:

Frank C. Mason, being duly sworn, deposes and says:

That he is of counsel with Rosen & Rosen, Esqs., proctors for claimant Lillian M. Henn, as Administratrix of the Estate of Robert C. Henn, deceased in the above entitled matter and is familiar with the facts thereof. This affidavit is submitted in support of a motion to vacate the restraining order heretofore entered in this cause on October 8th, 1954 in so far as it enjoins the prosecution by said Lillian M. Henn of a suit which was instituted on her behalf in Supreme Court for the State of New York, Ulster County against the petitioner herein.

The decedent, Robert C. Henn, lost his life on July 10th, 1954, leaving him surviving his said widow, Lillian M. Henn and three daughters of ages nine, five and four respectively. At the time of his death he was thirty-six years of

age, was in good health and gainfully employed. At about 12:45 A. M. on July 10, 1954 while said Robert C. Henn [fol. 50] was lawfully a passenger on the motor yacht BLACKSTONE which was proceeding in the Hudson River, south of Esopus Meadows Light House in the County of Ulster, it was in collision with the oil barge L.T.C. No. 38 in tow of the diesel tug EASTERN CITIES, both owned by the petitioner herein. As a result of said disaster said Robert C. Henn was drowned and his body was never recovered.

On or about September 22nd, 1954 suit was instituted in Supreme Court for the State of New York, Ulster County by Lillian M. Henn, as Administratrix of the Estate of Robert C. Henn deceased, represented by Rosen & Rosen, Esqs., against Lake Tankers Corporation, as owner of the tug EASTERN CITIES and tank barge L.T.C. No. 38 and also against Clyde Roan, as owner of the yacht BLACKSTONE to recover damages for the death of said Robert C. Henn in the sum of \$500,000. In said suit said Administratrix will be entitled to a jury trial.

Thereafter the within limitation proceeding was instituted on October 6th, 1954 by the filing of a petition by Lake Tankers Corporation, seeking exoneration from and limitation of all liability. On October 8th, 1954 the usual restraining order, based on the said petition, issued and by its terms the prosecution of claimant's State Court action against petitioner was enjoined. A true copy of such restraining order is annexed hereto, made a part hereof and marked Exhibit A.

Upon the filing of the petition, petitioner filed also an ad interim stipulation for value in the sum of \$118,542.21, representing the alleged aggregate value of petitioner's interest [fol. 51] in the tug EASTERN CITIES and her pending freight at the termination of the voyage on which she was engaged at the time the loss occurred. Subsequently, pursuant to the order of this Court entered January 27th, 1955, pursuant to a hearing before Honorable Sylvester J. Ryan, the petitioner filed an ad interim stipulation for value of the barge L.T.C. No. 38 in the sum of \$165,000. Accordingly the limitation fund in this proceeding is in the total amount of \$283,542.21.

Pursuant to notice given in the proceeding claims have

been filed, as reported by the petitioner, eleven in number, made up as follows:

Claimant	Amount	Nature	Attorney or Proctor
1. John W. Van Wart	\$ 50.00	Property loss and damage	Joseph Giudice, 11 Market Street Poughkeepsie, N. Y.
2. William F. Hughes	50.00	"	Same
3. Robert D. McNutt	50.00	"	Same
4. Robert E. Cruz	225.00	"	Same
5. Albert H. Raymond, Jr.	50.00	"	Same
6. Ernest Cady	50.00	"	Same
7. William B. Ratledge	50.00	"	Same
8. Charles Carlson	3,000.00	Personal injury and property loss and damage	Michael Nardone, Highland, N. Y.
9. Clyde W. Roan	4,400.00	"	Same
10. John Strong	1,600.00	"	Same
11. Lillian M. Henn Administratrix	250,000.00	For death of Robert C. Henn	Rosen & Rosen, 11 Market Street, Poughkeepsie, N. Y.

making a total of
claims filed of

\$259,525.00

Accordingly the limitation fund herein of \$283,542.21 is clearly in excess of the total amount of the claims filed.

The claimant Lillian M. Henn hereby consents to reduce her claim in the State Court action aforesaid to the [fol. 52] amount claimed in this proceeding, namely \$250,000 and stipulates that she will not enter judgment in excess of that amount in the State Court proceeding. She further is prepared to enter into any formal stipulation with petitioner in further compliance of these conditions. Upon such consent and stipulation, it is respectfully submitted, that the restraining order heretofore entered on October 8th, 1954 should be vacated as to this claimant and the suit pending in her behalf in New York State Supreme Court, Ulster County.

Wherefore it is respectfully prayed that claimant's motion herein be granted.

Frank C. Mason.

Sworn to before me this 14th day of March 1955.

Gladys A. White, Notary Public, State of New York,
No. 43-9641600, Qualified in Richmond County,
Cert. filed in New York Co. Clerks' Commission
Expires March 30, 1956.

[Seal.]

EXHIBIT A (ORDER FOR MONITION AND INJUNCTION)

Omitted. Printed side page 16 ante.

[fol. 53] Acknowledgment of service (omitted in printing).

[fol. 54] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

ORDER DENYING MOTION TO VACATE THE RESTRAINING ORDER
ENTERED OCTOBER 8, 1954, WITHOUT PREJUDICE, ETC.—
August 10, 1955

Claimant Lillian M. Henn, Administratrix; by notice of motion dated March 14, 1955 having moved for an order vacating the restraining order entered herein on October 8, 1954 with respect to the action pending in the Supreme Court of the State of New York, Ulster County, brought by said claimant as Administratrix of the goods, chattels and credits of Robert C. Henn, deceased, against the petitioner herein; and said motion having regularly come on to be heard at a term of this Court for the hearing of motions, and Frank C. Mason, Esq., having appeared of counsel in support of the motion, and Eugene Underwood, Esq., of counsel for petitioner, having appeared in opposition thereto, and the Court after due deliberation having filed its opinion on July 14, 1955 denying the motion but without prejudice to a further application to be made on certain conditions;

Now, on the notice of motion dated March 14, 1955, the affidavit of Frank C. Mason, Esq., sworn to March 14, 1955 and the affidavit of Eugene Underwood, Esq., sworn to April 6, 1955, on the opinion of this Court filed herein on [fol. 55] July 14, 1955, and on all the proceedings heretofore had herein, it is, by the Court,

Ordered that the motion of Lillian M. Henn, as Administratrix of the goods, chattels and credits of Robert C. Henn, deceased, for an order vacating the restraining order entered herein on October 8, 1954 be, and it hereby is in all respects denied but without prejudice to a further application by said claimant in the event appropriate stipulations are filed bringing the total amount of claims filed herein within the amounts of the respective interim stipulations heretofore filed herein on behalf of the tug EASTERN CITIES and the Barge LTC No. 38.

Dated: New York, N. Y., August 10, 1955.

Edward Weinfeld, U. S. D. J. H.A.C.

[fol. 56] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF MOTION—August 4, 1955

SHE:

Please Take Notice that an order, of which the within is a copy, will be presented for settlement and signature to the Honorable Edward Weinfeld, United States District Judge, at the office of the Clerk of this Court in the United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 10th day of August, 1955, at 11:00 o'clock in the forenoon of that day.

Dated: New York, N. Y., August 4, 1955.

Yours, etc., Burlingham, Hupper, & Kennedy, Proctors for Petitioner, Office & P. O. Address, 27 William Street, Borough of Manhattan, City of New York.

To: Messrs. Rosen & Rosen, Proctors for Claimant, Lillian M. Henn, Admx., 11 Market Street, Poughkeepsie, New York.

Frank C. Mason, Esq., of Counsel, 25 Broadway, New York, New York.

[fol. 57] Proof of service (omitted in printing).

[fol. 58]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

STIPULATION OF CLAIMANT LILLIAN M. HENN

Claimant Lillian M. Henn, as Administratrix of the goods, chattels and credits of Robert C. Henn deceased who has, by her proctors Rosen & Rosen, heretofore filed a claim in this limitation proceeding in the amount of \$250,000 hereby stipulates:

1. That her claim as against the tug EASTERN CITIES, the ad interim stipulation for value filed on its behalf, the petitioner and its stipulators for value is hereby reduced to the sum of \$100,000.

2. That her claim as against the barge L.T.C. No. 38, the ad interim stipulation for value filed on its behalf, the petitioner and its stipulators for value is hereby reduced to the sum of \$150,000.

3. That she will not increase the amount of either of said claims as against either of the said vessels, as above stated, or the petitioner and its stipulators for value at any future date beyond the amounts so stated.

4. That she will not enter judgment in any Court in excess of the stipulated amounts of her claims against petitioner as owner of either of said vessels.

[fol. 59] 5. That she hereby waives any claim of *res judicata* relevant to the issue of limited liability with respect to either of said vessels, based on a judgment in any other Court.

Dated September 6th, 1955.

Lillian M. Henn, as Administratrix of the goods, chattels and credits of Robert C. Henn, deceased.

[fol. 60] *Duly sworn to by Lillian M. Henn. Jurat omitted in printing.*

[fol. 61]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT; SOUTHERN DISTRICT OF
YORK

[Title omitted]

NOTICE OF MOTION TO VACATE RESTRAINING ORDER—Filed
September 23, 1955

SIRS:

Please take notice that upon all the pleadings and proceedings heretofore had herein and the annexed affidavit of Frank C. Mason, sworn to the 23rd day of September 1955 the undersigned will move this Court at a Stated Term for the hearing of motions to be held at the United States Court House, Foley Square, New York, N.Y. on the 4th day of October 1955 at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order vacating the restraining order heretofore entered herein on October 8th, 1954 with respect to the suit pending in the Supreme Court, State of New York, Ulster County on behalf of claimant Lillian M. Henn, as Administratrix of the Estate of Robert C. Henn deceased against the petitioner herein and we will ask the Court for such other and further relief as may be just in the premises.

Dated New York, N.Y., September 23rd, 1955.

Rosen & Rosen, Proctors for Claimant, Lillian M.
Henn, Office & P. O. Address, 11 Market Street,
Poughkeepsie, New York.

To: Burlingham, Hupper & Kennedy, Esqs., Proctors for
Petitioner, 27 William Street, New York, N. Y.

[fol. 62] Joseph Giudice, Esq., Proctor for Claimants,
John W. VanWart, William F. Hughes, Robert D. McNutt,
Robert E. Cruz, Albert H. Raymond, Jr., Ernest Cady and
William V. Ratledge, 11 Market Street, Poughkeepsie, New
York.

Michael Nardone, Proctor for Claimants, Charles Carlson,
Clyde W. Roan and John Strong, Highland, New York.

[fol. 63]

[Title omitted]

AFFIDAVIT OF FRANK C. MASON

STATE OF NEW YORK,

County of New York, ss:

Frank C. Mason, being duly sworn, deposes and says:

That he is of counsel with Rosen & Rosen, Esqs., proctors for claimant Lillian M. Henn, as Administratrix of the Estate of Robert C. Henn, deceased in the above entitled matter and is familiar with the facts thereof. This affidavit is submitted in support of a motion to vacate the restraining order heretofore entered in this cause on October 8th, 1954 in so far as it enjoins the prosecution by said Lillian M. Henn of a suit which was instituted on her behalf in Supreme Court for the State of New York, Ulster County against the petitioner herein.

The decedent, Robert C. Henn, lost his life on July 10th, 1954, leaving him surviving his said widow, Lillian M. Henn and three daughters of ages nine, five and four respectively. At the time of his death he was thirty-six years of age, was in good health and gainfully employed. At about 12:45 A. M. on July 10th, 1954 while said Robert C. Henn was [fol. 64] lawfully a passenger on the motor yacht BLACKSTONE which was proceeding in the Hudson River, south of Esopus Meadows Light House in the County of Ulster, it was in collision with the oil barge L.T.C. No. 38 in tow of the diesel tug EASTERN CITIES, both owned by the petitioner herein. As a result of said disaster said Robert C. Henn was drowned and his body was never recovered.

On or about September 22nd, 1954 suit was instituted in Supreme Court for the State of New York, Ulster County by Lillian M. Henn, as Administratrix of the Estate of Robert C. Henn deceased, represented by Rosen & Rosen, Esqs., against Lake Tankers Corporation, as owner of the tug EASTERN CITIES and tank barge L.T.C. No. 38 and also against Clyde Roan, as owner of the yacht BLACKSTONE to recover damages for the death of said Robert C. Henn in the sum of \$500,000. In said suit said Administratrix will be entitled to jury trial.

Thereafter the within limitation proceeding was instituted on October 6th, 1954 by the filing of a petition by Lake Tankers Corporation, seeking exoneration from and limitation of all liability. On October 8th, 1954 the usual restraining order, based on the said petition, issued and by its terms the prosecution of claimant's State Court action against petitioner was enjoined. A true copy of such restraining order is annexed hereto, made a part hereof and marked Exhibit A.

Upon the filing of the petition, petitioner filed also an ad interim stipulation for value in the sum of \$118,542.21, representing the alleged aggregate value of petitioner's interest in the tug EASTERN CITIES and her pending freight at the termination of the voyage on which she was engaged at the time the loss occurred. Subsequently, according to the order of this Court entered January 27th, 1955, pursuant to a hearing before Honorable Sylvester J. Ryan, the petitioner filed an ad interim stipulation for value of the barge L.T.C. No. 38 in the sum of \$165,000.

Pursuant to notice given in the proceeding, claims were originally filed, as reported by the petitioner, eleven in number, made up as follows:

Claimant	Amount	Nature	Attorney or Proctor
1. John W. Van Wart	\$ 50.00	Property loss and damage	Joseph Giudice, 11 Market Street Poughkeepsie, N. Y.
2. William F. Hughes	50.00	"	Same
3. Robert D. McNutt	50.00	"	Same
4. Robert E. Cruz	225.00	"	Same
5. Albert H. Raymond, Jr.	50.00	"	Same
6. Ernest Cady	50.00	"	Same
7. William B. Ratledge	50.00	"	Same
8. Charles Carlson	3,000.00	Personal injury and property loss and damage	Michael Nardone, Highland, N. Y.
9. Clyde W. Roan	4,400.00	"	Same
10. John Strong	1,600.00	"	Same
11. Lillian M. Henn	250,000.00	For death of Robert C. Henn	Rosen & Rosen, 11 Market Street, Poughkeepsie, N. Y.
making a total of claims filed of	\$259,525.00		

Pursuant to notice of motion and affidavit of deponent, for an order vacating the restraining order heretofore entered herein on October 8th, 1954 in so far as it enjoined the

prosecution by said Lillian M. Henn of her suit which is pending in the Supreme Court of the State of New York, Ulster County against the petitioner and claimant Clyde W. Roan, owner of the motor yacht BLACKSTONE, on April 28th, 1955, the matter was heard by Honorable Edward Weinfeld [fol. 66], at the regular motion part. A true copy of Judge Weinfeld's opinion dated July 14th, 1955 is annexed hereto and marked Exhibit B. It was the contention of the claimant that since the petitioner, at the outset of the proceedings should have filed security for both the barge L.T.C. No. 38 and the tug EASTERN CITIES of a total sum of \$283,54.21 and the claims totalled \$259,525, in a lesser amount than what claimant contended was the true limitation fund, the restraining order of October 8th, 1955 should be vacated or modified to permit her to prosecute her State Court suit. Judge Weinfeld has held that the security filed on behalf of the tug and the barge should be treated as separate funds and accordingly he wrote:

"This motion is denied but without prejudice to a further application by the claimant in the event appropriate stipulations are filed bringing the claims as against each vessel within the amount of its bond".

In accordance with the opinion, an order was signed by Judge Weinfeld and entered on August 10th, 1955 as follows:

"Ordered that the motion of Lillian M. Henn, as Administratrix of the goods, chattels and credits of Robert C. Henn, deceased, for an order vacating the restraining order entered herein on October 8, 1954 be, and it hereby is in all respects denied but without prejudice to a further application by said claimant in the event appropriate stipulations are filed bringing the total amount of claims filed herein within the amounts of the respective interim stipulations heretofore filed herein on behalf of the Tug Eastern Cities and the Barge LTC No. 38".

A copy of said order, attached hereto, is marked Exhibit B-1 [fol. 67] The required particulars of the stipulations to

which the Court there referred are found in *Petition of Texas Co.* 2 Cir., 213, Fed. (2) 479, at page 481. On September 23rd, 1955 stipulations have been filed with the Clerk of this Court on behalf of all claimants, including the claimant Lillian M. Henn. Copies thereof are annexed hereto and marked Exhibit C, D, E and F. It will be noted that such stipulations, in compliance with Judge Weinfeld's decision, bring the claims as against each vessel within the amount of its bond. The bond filed on behalf of the tug EASTERN CITIES is in the amount of \$118,542.21, while the claims now asserted against her, according to the stipulations, total \$109,525. The bond filed on behalf of the barge L. T. C. No. 38 is in the amount of \$165,000, while the claims now asserted against her, according to the stipulations, are \$159,525. Claimants have all agreed that their claims will never be increased, that they will not enter judgment in any Court in excess of the stipulated amounts and that any claim of *res judicata* relevant to the issue of limited liability, based on a judgment in any other Court, is waived. (*Petition of Texas Co., supra*).

As claimants have now complied with the opinion of Judge Weinfeld, and the order entered thereon on August 10th, 1955, it is respectfully submitted that the restraining order heretofore entered on October 8th, 1954 should be [fol. 68] modified to permit claimant's pending State Court suit in Supreme Court, Ulster County to proceed to judgment.

Frank C. Masen.

Sworn to before me this 23rd day of September 1955.
Gladys A. White.

Gladys A. White, Notary Public, State of New York,
No. 43-9641600, Qualified in Richmond County, Cert.
filed in New York Co. Clerks, Commission Expires
March 30, 1956.

[fols. 69-70] EXHIBIT A. (Order for monition and
injunction) Omitted. Printed side page 16 ante.

[fol. 71]

EXHIBIT B TO AFFIDAVIT

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

Ad. 183-206

IN THE MATTER OF THE PETITION OF LAKE TANKERS CORPORATION,
FOR EXONERATION FROM OR LIMITATION OF LIABILITY

OPINION

APPEARANCES:

Burlingham, Hupper & Kennedy, 27 William Street, New York, N. Y., Proctors for Petitioner, Eugene Underwood and H. Barton Williams, Of Counsel.

Rosen & Rosen, 11 Market Street, Poughkeepsie, New York, Proctors for Claimant Lillian M. Henn, Appearing Specially, Paul Rosen and Frank C. Mason, Of Counsel.

EDWARD WEINFELD, D. J.

The claimant moves to modify the restraining order entered in the limitation proceeding so as to permit her to proceed with a suit against petitioner in the New York State Supreme Court commenced in her capacity as Administratrix of the estate of her late husband.

The claim arises out of a collision in the Hudson River between the motor yacht Blackstone, on which deceased was [fol. 72] a passenger, and the tank barge LTC No. 38 then in tow of the tug Eastern Cities. The tug and the barge are owned by the petitioner. The Eastern Cities was push-towing No. 38 up the Hudson River and the yacht was proceeding downstream when the collision occurred. The yacht sank and deceased was drowned. The other passengers aboard the yacht and its owner have also filed claims against the petitioner.

In all there are eleven claimants and their claims aggregate \$259,525. The total of two bonds filed in the limitation proceeding is \$283,542.21. Accordingly, the claimant-Administratrix, in reliance upon Petition of Texas Co., 2 Cir.,

213 F. 2d 479, and other authorities¹ seeks to lift the restraint.

The petitioner contends that *Petition of Texas Co., supra*, is inapplicable; that in fact the limitation funds do not exceed the aggregate of all claims filed against it. It urges that in the instant proceeding there is not a single limitation fund of \$283,542.21 but on the contrary two separate funds, one for the *Eastern Cities* in the sum of \$118,542.21 and the other for the *LTC No. 38* in the amount of \$165,000, and that pending a final determination of liability on the part of each vessel, each fund must be treated separately and so treated clearly the eleven claims exceed each fund and so must be brought into concurrence. [fol. 73] The facts which led up to the filing of the separate ad interim stipulations are as follows: In September, 1954 claimant as Administratrix commenced her action in the State Supreme Court, Ulster County, to recover damages for the wrongful death of decedent. The complaint charged that the *Lake Tankers Corporation* as owner of both the barge and tug, was negligent and contributed to the death of decedent. The owner of the yacht *Blackstone*, was also named as a defendant in the action and charged with negligence in its operation.

Thereafter the petitioner filed the limitation proceeding as owner of both the tug and barge but gave an ad interim stipulation only for the value of its interest in the tug *Eastern Cities* and pending freight in the sum of \$118,542.21. The usual restraining order issued but was not limited to the tug *Eastern Cities*. The restraint also enjoined prosecution of claimant's state court action against petitioner with respect to the barge as well. The petition alleged that the barge was without motive power, that both vessels were seaworthy; that both were exhibiting regulation lights. The claimant in filing exceptions to the petition disputed these allegations and contended, amongst other matters, that one of the issues to be determined upon a trial was the lack of navigation lights upon the barge.

¹ *Curtis Bay Towing v. Tug Kevin Moran, Inc.*, 2 Cir., 159 F. 2d 273; *Petition of Poling Holding Corp.*, S. D. N. Y., 120 F. Supp. 890; *In re Trawler Gudrum, Inc.*, D. Mass., 101 F. Supp. 586.

She then moved to dismiss the petition on the ground that although petitioner sought exoneration from, or in the alternative limitation of, liability it had failed as owner of the barge to offer an ad interim stipulation for [fol. 74] its interest in the barge and her pending freight and had failed to surrender or offer to surrender the vessels as required by the statute. Judge Ryan sustained the exception to the extent of providing that in the event the petitioner filed a bond for the value of the barge the restraining order would remain in force; and failing which the restraint would be modified so as to continue in effect only with respect to suits against the tug *Eastern Cities*.

The petitioner then filed a second bond in the sum of \$165,000 representing the value of its interest in the barge, which led to the filing of the present motion.

The basis of claimant's contention that both bonds must be totalled is that when two or more vessels of the same owner contribute to a disaster the owner may not limit liability without surrendering his interest in all vessels.² While this is so, and the bond to cover the barge was ordered by Judge Ryan to meet this contingency, vessels in single ownership engaged in a common enterprise, absent a claim based on a contractual relationship,³ may not be treated as a unit until it is determined whether each is personally at fault, in rem. Up to that time each must be deemed an independent entity, and upon being charged with fault is subject to surrender as such, and in any limitation proceeding a separate stipulation is required [fol. 75] "as a substitute for the vessel itself."⁴ Liability is governed by the individual wrongdoing of each vessel involved and a petitioner may only be called upon to surrender such vessels as are found at fault.⁵

Thus in the instant case, while it is true liability is

² *United States v. The Australia Star*, 2 Cir., 172 F. 2d 472, 478.

³ *Sacramento Nav. Co. v. Salz*, 273 U. S. 326; *Standard Dredging Company v. Kristansen*, 2 Cir., 67 F. 2d 548.

⁴ *Hartford Accident Co. v. Sou. Pacific*, 273 U. S. 207, 220.

⁵ *Liverpool &c. Nav. Co. v. Brooklyn Term'l*, 251 U. S. 48; *The Transfer No. 21*, 2 Cir., 248 Fed. 459.

charged against the barge, which was without motive power, as well as the tug, it may eventuate that only the tug will be found liable, in which event the bond posted for the barge could not be availed of. In such circumstance the claimants would have recourse only to the bond of \$118,542.21 posted for the tug, a sum far below the total of the pending claims of \$259,525, indicating the need for a concurrence of claims to enforce an equitable pro rata distribution of the fund.⁶ Parenthetically it is noted that the ad interim stipulation, while based on affidavits of petitioner's own appraisers, does not necessarily determine the value of petitioner's interest in the tug which may eventually be found to be more or less than the amount of the stipulation.

Particularly appropriate is the holding in *Harbor Towing Corp. v. Atlantic Mutual Insurance Company*, 4 Cir., 189 F. 2d 409, where the court said: "It is true that the tug and tow were operating as a unit at the time of the collision in the instant case and that such a flotilla may be [fol. 76] considered a single vessel for many purposes, including limitation of liability * * * but as to third persons the liability of tug and tow depend upon their individual wrongdoing, and in case of collision with a third ship, the value of the guilty vessel alone is the limit of the owner's liability.

Indeed, it is significant that Judge Ryan's order provided that if a bond were not posted for the barge it would not effect the restraining order previously issued with respect to claims against the tug but would permit claimants to proceed with their suits against the barge.

Just as the owner's allegation that the barge was free from fault did not dispense with requiring it to post a bond or to surrender the barge to obtain the benefit of the Limitation Act, so the mere allegation by the claimant that the barge is at fault does not establish the fact so as to require at this time that it and the tug be considered a

⁶ *Curtis Bay Towing Co. v. Tug Kevin Moran*, 2 Cir., 159 F. 2d 273; *Rice Growers Ass'n. v. Rederiaktiebolaget Erode*, 9 Cir., 171 F. 2d 662; *Petition of Tracy*, E. D. N. Y., 86 F. Supp. 306.

single vessel. Whether it was an offending vessel can only be determined after a trial of the contested issue.

The cases relied upon by libellant to treat the vessels at this time as a single unit so as to permit considering the bonds as one are inapposite.⁷ In all instances they were so regarded only after a determination which fixed liability [fol. 77] ity with respect to each vessel or else involved contractual relationships.

The motion is denied but without prejudice to a further application by the claimant in the event appropriate stipulations are filed bringing the claims as against each vessel within the amount of its bond.

Settle order on notice.

Edward Weinfeld, United States District Judge.

July 14, 1955.

[fols. 78-79] EXHIBIT B-1 (Order denying motion to vacate the restraining order, etc.) omitted. Printed side page 54, ante.

[fols. 80-82] EXHIBIT C (Stipulation of claimant Lillian M. Henn) omitted. Printed side page 58, ante.

⁷ United States v. The Australia Star, 2 Cir., 172 F. 2d 472; Sabine Towing Co. v. Brennan, 5 Cir., 72 F. 2d 490; The Bowling Green, E. D. N. Y., 11 F. Supp. 109; The Bordentown, S. D. N. Y., 40 Fed. 682.

[fol. 83]

EXHIBIT D TO AFFIDAVIT

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

A 183-206

In the Matter of the Petition of LAKE TANKERS CORPORATION,
for exoneration from or limitation of liability

The undersigned, claimants in the above entitled limitation proceedings, who have, by their proctor Michael Nardone, filed claims herein in the following amounts:

Charles Carlson	\$3,000.00
Clyde W. Roan	4,400.00

hereby stipulates, with respect to the ad interim stipulation for value filed by petition on behalf of the tug EASTERN CITIES in the sum of \$118,542.21 and the ad interim stipulation for value filed by said petitioner on behalf of the barge L. T. C. No. 38 in the amount of \$165,000:

1. That they will not increase the amount of each of their said claims as against either of the said vessels or the petitioner and stipulators for value, at any future date beyond the amounts above stated.

2. That they will not enter judgment in any Court in excess of the stipulated amounts of their claims against petitioner as owner of either of said vessels.

3. That they hereby waive any claim of *res judicata* relevant to the issue of limited liability with respect to either [fol. 84] of said vessels, based on a judgment in any other Court.

Michael Nardone (Signed), Charles Carlson
(Signed), Clyde W. Roan (Signed).

[fol. 85] *Duly sworn to by Charles Carlson and Clyde W. Roan. Jurat omitted in printing.*

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

In the Matter of the Petition of LAKE TANKERS CORPORATION,
for exoneration from or limitation of liability

The undersigned, proctor for claimant John Strong in the above entitled limitation proceedings and who has filed claim herein on his behalf in the amount of \$1,600.00 hereby stipulates with respect to the ad interim stipulation for value filed by petitioner on behalf of the tug EASTERN CITIES in the sum of \$118,542.21 and the ad interim stipulation for value filed by said petitioner on behalf of the barge L. T. C. No. 38 in the amount of \$165,000:

1. That said claimant will not increase the amount of his said claim as against either of the said vessels or the petitioner and stipulators for value, at any future date beyond the amount above stated.

2. That he will not enter judgment in any Court in excess of the stipulated amount of his claim against petitioner as owner of either of said vessels.

3. That he hereby waives any claims of *res judicata* relevant to the issue of limited liability with respect to either of said vessels, based on a judgment in any other Court.

[fol. 87] Said proctor further represents to the Court that he is authorized to execute this stipulation on behalf of claimant, John Strong, who at this time is absent from the jurisdiction of the Court and the place where proctor has and maintains his office.

Michael Nardone (Signed), Proctor for Claimant,
John Strong.

September 20, 1955.

[fol. 88]

EXHIBIT F TO AFFIDAVIT

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

A 183-206

In the Matter of the Petition of LAKE TANKERS CORPORATION, for exoneration from or limitation of liability

The undersigned, proctor for the below named claimants in the above entitled limitation proceedings and who has filed claims on their behalves in the following amounts:

John W. Van Wart	\$ 50.00
William F. Hughes	50.00
Robert D. McNutt	50.00
Albert H. Raymond, Jr.	50.00
Robert E. Cruz	225.00
Ernest Cady	50.00
William B. Ratledge, Jr.	50.00

hereby stipulates, with respect to the ad interim stipulation for value filed by petitioner on behalf of the tug EASTERN CITIES in the sum of \$118,542.21 and the ad interim stipulation for value filed by said petitioner on behalf of the barge L. T. C. No. 38 in the amount of \$165,000 that:

1. Said claimants will not increase the amount of each of their said claims as against either of the said vessels or the petitioner and stipulators for value, at any future date beyond the amounts above stated.

2. That they will not enter judgment in any Court in excess of the stipulated amounts of their claims against petitioner as owner of either of said vessels.

[fol. 89] 3. That they hereby waive any claim of *res judicata* relevant to the issue of limited liability with respect to either of said vessels, based on a judgment in any other Court.

Said proctor further represents to the Court that he is authorized to execute this stipulation on behalf of the claimants above named, and the amounts of whose claims are not affected by or require change in amount to conform with

the decision of Honorable Edward Weinfeld dated July 14th, 1955 and the order entered thereon on August 10th, 1955.

Joseph Giudice (Signed), Proctor for Claimants,
John W. Van Wart, William F. Hughes, Robert D.
McNutt, Albert H. Raymond, Jr., Robert E. Cruz,
Ernest Cady and William B. Ratledge, Jr.

[fol. 90] Proofs of service (omitted in printing).

[fol. 91] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

AFFIDAVIT OF EUGENE UNDERWOOD—Filed December 30, 1955

STATE OF NEW YORK,
County of New York, ss.:

Eugene Underwood, being duly sworn, deposes and says:

I am a member of the firm of Burlingham, Hupper & Kennedy, proctors for petitioner herein, and thoroughly familiar with all the proceedings heretofore had herein. This affidavit is made in opposition to motion made by notice dated September 23, 1955, on behalf of claimant Lillian M. Henn for an order vacating the restraining order heretofore entered herein on October 8, 1954.

The predicate of the present motion is that the claims against petitioner herein have by stipulation been reduced to an aggregate less than the limitation fund. This is not the fact; they have not been so reduced. The amounts of the claims of the claimants other than Lillian M. Henn have not been altered. The amount of the Henn claim as against petitioner has not been reduced; it has only been allocated

as between tug and barge. The aggregate of all claims remains as before. The claims are as follows:

[fol. 92] Henn Claim against petitioner:

Through the tug	\$100,000
Through the barge	150,000
The other nine claims	9,525
	<hr/>
	\$259,525

This total is the same as was the total of all the claims when this matter was before the Court on the previous motion of Lillian M. Henn to vacate the restraining order as to her.

It is notable also that the ad damnum in the State Court action, \$500,000, has not been reduced, nor has any offer or stipulation been made to reduce it.

Eugene Underwood.

Sworn to before me this 13th day of October, 1955.

Duly sworn to by Eugene Underwood. Jurat omitted in printing.

[fol. 93] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

Ad/ 183-206

IN THE MATTER OF THE PETITION OF LAKE TANKERS CORPORATION
FOR EXONERATION FROM OR LIMITATION OF LIABILITY

SUPPLEMENTAL MEMORANDUM DECISION—December 30, 1955

EDWARD WEINFELD, D. J.

Since the determination of the above matter the Court of Appeals decision in *In the Matter of Trinidad Corp.*, Docket

No. 23478, decided December 28, 1955, has come to my attention. In my view this decision, wherein the Court of Appeals reiterates its holding in *Petition of Texas Co.*, 2 Cir., 213 F. 2d 479, also supports the disposition made in the instant matter. However, proctors in presenting a proposed order shall in addition to the usual stipulations make the granting of the order conditional upon filing the further stipulations suggested in *In the Matter of Trinidad Corp.*

Edward Weinfeld, United States District Judge.

December 30, 1955.

[fol. 94] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

ORDER VACATING RESTRAINING ORDER—January 16, 1956

Claimant, Lillian M. Henn, Administratrix of the Estate of Robert C. Henn, deceased, by notice of motion dated September 23rd, 1955, having moved for an order vacating the restraining order entered herein on October 8th, 1954 with respect to the action pending in the Supreme Court of the State of New York, Ulster County, brought by said claimant against the petitioner herein; and said motion having regularly come on to be heard at a Term of this Court for the hearing of motions, and Frank C. Mason, Esq. having appeared of counsel in support of the motion and Eugene Underwood, Esq. of counsel for petitioner, having appeared in opposition thereto, and the Court after due deliberation having filed its opinion on December 30th, 1955, granting the said motion and the Court, thereafter, having filed its memorandum decision on December 30th, 1955, by which it instructed proctors with respect to the form of the order to be entered upon such motion;

Now, on the notice of motion dated September 23rd, 1955, the affidavit of Frank C. Mason, Esq. sworn to Sep-

tember 23rd., 1955, the affidavit of Eugene Underwood, Esq., sworn to October 13th, 1955, on the opinion of this Court filed herein on December 29th, 1955, and on its supplemental memorandum filed herein on December 30th, [fol. 95] 1955 and the claimant having offered her formal stipulation and partial release in favor of petitioner, acknowledged before a Notary Public, and dated January 7th, 1956, in compliance with the Court's supplemental memorandum of instructions, filed December 30th, 1955, the original of which stipulation and partial release is annexed hereto, it is, by the Court,

Ordered that the motion of Lillian M. Henn, as Administratrix of the goods, chattels and credits of Robert C. Henn, deceased, for an order vacating the restraining order entered herein on October 8th, 1954 with respect to her suit pending in the Supreme Court, State of New York, Ulster County, be and the same hereby is in all respects granted subject, however, to the following conditions:

1. that claimant shall be permitted to prosecute her suit in Supreme Court, State of New York, Ulster County only to judgment;

2. that the injunction of October 8th, 1954, insofar as it enjoins collection of the judgment elsewhere than in this proceeding, shall be continued;

3. that the Court expressly reserves jurisdiction to reestablish a concourse and to adjudicate the petitioner's right to a limitation in the event that the funds should ultimately prove to be inadequate;

4. that in no event shall this claimant recover from the fund an amount in excess of her claim as reduced by the partial releases heretofore given until all other claims have been satisfied in full;

5. that the Court further retains jurisdiction of this proceeding against the event that petitioner's right to limit liability of either the tug EASTERN CITIES or [fol. 96] barge L. T. C. No. 38 should be questioned in any other forum.

Edward Weinfeld, U. S. D. J.

Dated New York, N. Y., January 16th, 1956.

[fol. 97]

[Title omitted]

STIPULATION AND PARTIAL RELEASE—January 7, 1956

Claimant, Lillian M. Henn, as Administratrix of the goods, chattels and credits of Robert C. Henn, deceased, who by her proctors, Rosen & Rosen, has heretofore filed a claim in this proceeding in the amount of \$250,000 hereby stipulates and represents to the Court and to the petitioner as follows:

1. She reiterates and affirms the terms of the written stipulation, heretofore executed by her on September 6th, 1955, duly acknowledged before a Notary Public of the State of New York, Dutchess County, and filed herein on September 23rd, 1955, providing:

(a) that her claim as against the tug EASTERN CITIES, the ad interim stipulation for value filed on its behalf, the petitioner and its stipulators for value is reduced to the sum of \$100,000;

(b) that her claim as against the barge L. T. C. No. 38, the ad interim stipulation for value filed on its behalf, the petitioner and its stipulators for value is reduced to the sum of \$150,000;

(c) that she will not increase the amount of either of said claims as against either of the said vessels, as above stated, or the petitioner and its stipulators for value at any future date beyond the amounts so stated;

[fol. 98] (d) that she will not enter judgment in any Court in excess of the stipulated amounts of her claims against petitioner as owner of either of said vessels;

(e) that she hereby waives any claim of *res judicata* relevant to the issue of limited liability with respect to either of said vessels, based on a judgment in any other Court.

2. As her unconditional partial release she represents:

(a) that the total amount of all claims filed herein as against the tug EASTERN CITIES and the petitioner, as her owner, is \$109,525; the total amount of all

claims filed herein as against the barge L. T. C. No. 38 and the petitioner, as her owner, is \$159,525:

(b) that in consideration of the entry of an order upon this stipulation, pursuant to the decisions of Honorable Edward Weinfeld, United States District Judge, dated December 29th and 30th, 1955, modifying the injunctive order entered herein October 8th, 1954, to permit the prosecution of her suit in Supreme Court, State of New York, Ulster County, she hereby releases and forever discharges the petitioner, its successors and assigns and the tug EASTERN CITIES and the barge L. T. C. No. 38 unconditionally but partially to the extent hereinafter described from all causes of action whatsoever, in law, in admiralty, or in equity which against them she ever had, now has or which her successors hereafter shall or may have by reason of the death of Robert C. Henn on July 10th, 1954, resulting from a collision between the motor yacht BLACKSTONE, on which he was a passenger, with the barge L. T. C. No. 38 in tow of the tug EASTERN CITIES, in the Hudson River; it being the intent and purpose of this release that it be partial to the extent of the difference between the amount of her claim originally [fol. 99] filed herein in the sum of \$250,000 and the reduced amount of her claim heretofore stipulated as against the tug EASTERN CITIES of \$100,000, so that the amount hereby released as to such tug and the petitioner is \$150,000; and it being the further intent and purpose of this release that it be partial to the extent of the difference between the amount of her claim originally filed herein in the sum of \$250,000 and the reduced amount of her claim heretofore stipulated as against the barge L. T. C. No. 38 of \$150,000, so that the amount hereby released as to such barge and the petitioner is \$100,000.

3. She consents to, and hereby authorizes her proctors, Rosen & Rosen, to submit an order to the Court for entry and providing:

(a) that she shall be permitted to prosecute her suit in Supreme Court, State of New York, Ulster County only to judgment:

(b) that the injunction of October 8th, 1954, insofar as it enjoins collection of the judgment elsewhere than in this proceeding, shall be continued;

(c) that the Court expressly reserves jurisdiction to reestablish a concourse and to adjudicate the petitioner's right to a limitation in the event that the funds should ultimately prove to be inadequate;

(d) that in no event shall this claimant recover from the fund an amount in excess of her claim as reduced by the partial releases heretofore given until all other claims have been satisfied in full;

(e) that the Court further retains jurisdiction of this proceeding against the event that petitioner's right to limit liability of either the tug EASTERN CITIES or barge L. T. C. No. 38 should be questioned in any other forum.

[fol. 100] In witness whereof, I have hereunto set my hand and seal, as the Administratrix of the Estate of Robert C. Henn, deceased, the 7th day of January in the year One Thousand Nine Hundred and Fifty-six.

Lillian M. Henn, L. S., Administratrix of the Estate of Robert C. Henn, deceased.

[fol. 101] *Duly sworn to by Lillian M. Henn. Jurat omitted in printing.*

[fol. 102] Proofs of service (omitted in printing).

[fol. 103] IN UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT, OCTOBER TERM, 1955

No. 268

(Argued February 17, 1956)

Docket No. 23965

In the Matter of the Petition of LAKE TANKERS CORPORATION
for Exoneration from or Limitation of Liability

Before: CLARK, FRANK and HIXSON, *Circuit Judges*.

Appeal from an order, of the United States District
Court for the Southern District of New York, entered by
Judge Weinfeld. Modified and Affirmed as modified.

Burlingham, Hupper & Kennedy (New York, New
York), Proctors for Petitioner. Rosen & Rosen,
Proctors for Claimant-Appellee.

OPINION—April 13, 1956

On July 10, 1954 the yacht Blackstone was proceeding down the Hudson River. Petitioner's tug, Eastern Cities, push-towing petitioner's barge L. T. C. No. 38, was proceeding up the river. The Blackstone ran into the bow of L. T. C. No. 38 and capsized. Ten of the eleven persons [fol. 104] aboard the Blackstone were rescued by the Eastern Cities, but appellee's decedent was drowned. Appellee began an action in the New York Supreme Court, Ulster County, against petitioner to recover \$500,000 damages for the loss of her husband's life, alleging negligence on petitioner's part in respect of its operation of both the tug and the barge. Four other actions by survivors were begun in the State Court, alleging damages aggregating \$157,000. On October 6, 1954, petitioner filed, in the court below, a petition for its exoneration from or limitation of liability. The petition alleged that the collision occurred without fault on the part of any of petitioner's servants and that petitioner was entitled to exoneration; it also alleged that the collision occurred without petitioner's privity or knowledge and that, if liable, petitioner was entitled to limit its

liability to the value of its interest in both vessels. However, bond was given for \$118,542.21, representing only the value of petitioner's interest in tug Eastern Cities and her pending freight. On October 8, 1954, the usual restraining order was issued, enjoining the beginning or prosecution of claims against petitioner except in the limitation proceeding; that order was not limited to the tug.

Appellee appeared specially and moved to dismiss the petition and to vacate the restraining order, on the ground that the bond failed to include the value of petitioner's interest in barge L. T. C. No. 38. This motion was denied by Judge Ryan, who continued the restraining order in force, conditioned, however, upon petitioner's filing an additional bond for the value of its interest in the barge, failing which the restraint would be modified so as to continue in effect only as to suits against petitioner as owner of the tug. Petitioner then filed an additional bond for the barge in the sum of \$165,000. Appellee thereupon filed in the limitation proceeding, her claim for \$250,000. Other [fol. 107] claims, aggregating \$9,525 were filed on behalf of the ten rescued survivors.

Appellee then moved before Judge Weinfeld to vacate the restraining order as to her state court suit, on the theory that, since the total security on behalf of the tug and barge amounted to \$283,542.21 and the claims totalled \$259,525, upon the filing of appropriate stipulations in accordance with this Court's decision in *Petition of Texas Co.*, 213 F. 2d 479, the restraint should be lifted. Judge Weinfeld denied that motion (in an opinion reported in 132 F. Supp. 504) without prejudice to a further application by appellee in the event appropriate stipulations were filed bringing all claims against petitioner as to each vessel within the amount of the bond as to such vessel. On September 23, 1955 the ten claimants, other than appellee, filed the usual stipulations agreeing not to increase the amounts of their claims as made, nor to enter judgments in excess of the stipulated amounts and waiving any claim of *res judicata* relative to the issue of limited liability with respect to either of the vessels. On the same day appellee filed a stipulation reducing her claim against petitioner as to the tug Eastern Cities to \$100,000 and as to the barge to \$150,000. She also agreed not to increase the amount of

either of said claims as to either of the vessels, or to enter judgment in excess of the stipulated amounts of her claims against petitioner as owner of either of them, and she waived any claim of *res judicata* relative to the issue of limited liability in respect of either of the vessels.

Appellee again moved for modification of the restraining order. Judge Weinfeld wrote an opinion granting the motion, and, on January 17, 1956 entered an order to that effect. His order was explicitly based on appellee's stipulation (including partial releases, to which she had sworn before a notary public). In the stipulation and partial [fol. 106] releases, she agreed to reduce her claim against petitioner (1) as to the tug to \$100,000 and (2) as to the barge to \$150,000. The other ten claims totalled \$9,525.

In his opinion, Judge Weinfeld said in part: "In addition to the moving claimant there are ten others and the eleven claims constitute all possible claims which could be filed in this proceeding as a result of the disaster and the time to file has expired. The bond filed on behalf of the tug Eastern Cities is in the sum of \$118,542.21, while the claims asserted against her under the stipulations filed by the claimants are limited to \$109,525; the bond filed on behalf of the barge L. T. C. No. 38 is in the sum of \$165,000, while the claims asserted against her under the stipulations filed by claimants are limited to \$159,525. * * * There are now two separate funds, one for the tug and one for the barge. Each limitation fund is clearly in excess of the total sum of the claims asserted as against each vessel. A special verdict may be applied for which would spell out the precise liability that may be imposed with respect to each vessel. It is not to be presumed that the state court will deny an appropriate application for a special verdict. Thus in the event, under a special verdict, there is a finding of negligence in the operation of the tug and not of the barge, the moving claimant's recovery, under her stipulation, could not exceed the amount of her reduced claim. Accordingly, the total of her judgment and the remaining claims would be limited to the bond posted for the tug, which would preclude resort to the bond posted for the barge. And alternatively if liability were established solely because of the negligent operation of the barge, no recourse could be had as against the bond posted for the tug. Of course if

liability should be found with respect to both the tug and barge, a different situation would prevail. Since petitioner as shipowner is fully protected in the limitation of liability as to each vessel, there is no sound reason why claimant [fol. 107]. should not be permitted to proceed with her action in the state court—the forum of her choice.”

In the Appendix to this court's opinion are set forth pertinent parts of Judge Weinfeld's order and of appellee's stipulation (including her partial releases). From Judge Weinfeld's order, petitioner has appealed.

FRANK, Circuit Judge:

In *Petition of Texas Co.*, 213 F. 2d 479, 482 (C. A. 2), we stated, as follows, the principles applicable here, in accordance with our previous decisions: “Absent an insufficient fund, (1) the statutory privilege of limiting liability is not in the nature of a *forum non conveniens* doctrine, and (2) the statute gives a ship-owner, sued in several suits (even if in divers places) by divers persons, no advantage over other kinds of defendants in the same position. Concourse is to be granted ‘only when * * * necessary in order to distribute an inadequate fund.’”¹ The purpose of limitation proceedings is not to prevent a multiplicity of suits, but in equitable fashion, to provide a marshalling of assets—the distribution pro rata of an inadequate fund among claimants, none of whom can be paid in full.”² We quoted the provisions of 46 U. S. C. A. Section 184 that, when loss is suffered by several persons, “and the whole vessel and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation * * * in proportion to their respective losses,” and that the limitation proceedings are

¹ Here we cited *Curtis Bay Towing Co. v. Tug Kevin Moran, Inc.*, 159 F. 2d 273, 276 (C. A. 2).

² Here we cited *Petition of Moran Transportation Corp.*, 185 F. 2d 386, 388-389 (C. A. 2); *Petition of Red Star Barge Line, Inc.*, 160 F. 2d 436 (C. A. 2); *The Aquitania*, 14 F. 2d 456, 458, affirmed 20 F. 2d 457 (C. A. 2).

"for the purpose of apportioning the sum * * * among the [fol. 108] parties entitled thereto." Subsequently, we said the same in *Matter of Trinidad Corp.*, — F. 2d — (C. A. 2, December 28, 1955) and in *George J. Waldie Towing Co. v. Richa*, 227 F. 2d 900, 901 (C. A. 2).

Section 184 covers the liability of "the owner" of "the vessel." In the case at bar, it happens that petitioner owns two vessels, and may be liable for the conduct of either vessel or both. Had each vessel been owned by a separate owner, each owner could have instituted a limitation proceeding. So the owner here could have instituted one such proceeding to limit its liability as tug-owner to the value of the tug, and another proceeding as barge-owner to limit its liability to the value of the barge. The owner cannot enlarge its rights under the statute by the mere expedient of coupling the two proceedings.

Accordingly, we must regard this case just as if it comprised two separate limitation proceedings. On that basis, we affirm. For, in respect of petitioner's liability as owner of each vessel, the order and appellee's stipulation (including her partial releases) comply with what we required in the *Trinidad* case. We interpret the order, the stipulation, and the partial releases, to relate to the liability of petitioner *in personam* as the owner of each vessel separately. All the claims against petitioner as the tug's owner come to \$109,525, an amount less than the bond of \$118,542.21 as to petitioner's liability as owner of that vessel; all the claims against petitioner as the barge's owner come to \$159,525, an amount less than the bond of \$165,000 as petitioner as owner of that vessel. Consequently, there was not an insufficient fund in respect of petitioner's liability either as owner of the tug or as owner of the barge.

As Judge Weinfeld said; a special verdict in the state court suit will decide whether petitioner is liable for the conduct of either or neither vessel, or both vessels. That suit will not interfere with the exclusive admiralty jurisdiction of the court below affecting the limitation of liability: (a) No judgement of the state court can operate *in rem*. (b) Appellee's stipulation (which includes a waiver of any claim of *res judicata* relevant to the issue of limited liability of petitioner as owner of either the tug or

the barge) and her partial releases, together with the reserved jurisdiction of the district court, prevent any effective determination by the state court of the value of either vessel.

We think, however, Judge Weinfeld's order should be amended to include the following: "If claimant obtains a judgment in her state court suit for an amount in excess of \$100,000, an injunction will issue permanently enjoining her from collecting such excess unless the judgment rests on a special verdict allocating the amount as between the libellant as owner of the tug and as owner of the barge respectively. Thus if the judgment exceeds \$100,000 and the jury finds libellant liable solely as owner of the tug, she will be enjoined from collecting any excess. If the jury finds that the libellant is liable solely as owner of the barge, she will be enjoined from collecting any amount in excess of \$150,000."

The other claimants are apparently content to proceed for a determination of their claims in the limitation proceeding.³ It is possible that the court below, in passing on their claims, may adjudge the petitioner not liable, while the state court in appellee's suit may adjudge otherwise. But such an eventuality will present no difficulty. For the adjudication in the limitation proceeding concerning liability or non-liability to the other claimants will not serve as *res judicata* or estoppel by verdict for or against appellee in her state court suit, nor will the adjudication concerning liability or non-liability in appellee's state court suit have such an effect for or against the other claimants in the limitation proceeding.

Modified and affirmed as modified.

³ Petitioner suggests that perhaps the other claimants may seek to proceed elsewhere. The resultant problem cannot arise unless and until they file appropriate stipulations and partial releases. Moreover, an application to relax the restraining order as to them must be made seasonably, as we said in *Trinidad*; and the limitation proceeding was instituted a year and four months ago.

APPENDIX

Judge Weinfeld's order of January 17, 1956 reads, in part, as follows:

"Ordered that the motion of Lillian M. Henn * * * for an order vacating the restraining order entered herein on October 8th, 1954 with respect to her suit pending in the Supreme Court, State of New York, Ulster County, be and the same hereby is in all respects granted subject, however, to the following conditions:

1: that claimant shall be permitted to prosecute her suit in Supreme Court, State of New York, Ulster County only to judgment;

2. that the injunction of October 8th, 1954, insofar as it enjoins collection of the judgment elsewhere than in this proceeding, shall be continued;

3. that the Court expressly reserves jurisdiction to reestablish a concourse and to adjudicate the petitioner's right to a limitation in the event that the funds should ultimately prove to be inadequate;

4. that in no event shall this claimant recover from the fund an amount in excess of her claim as reduced by the partial releases heretofore given until all other claims have been satisfied in full;

5. that the Court further retains jurisdiction of this proceeding against the event that petitioner's right to [fol. 110] limit liability of either the tug Eastern Cities or barge L. T. C. No. 38 should be questioned in any other forum."

Appellee's stipulation and partial releases read, in part, as follows:

"1. She reiterates and affirms the terms of the written stipulation, heretofore executed by her on September 6th, 1955, duly acknowledged before a Notary Public of the State of New York, Dutchess County, and filed herein on September 23rd, 1955, providing:

(a) that her claim as against the tug Eastern Cities, the ad interim stipulation for value filed on its behalf,

the petitioner and its stipulators for value is reduced to the sum of \$100,000;

(b) that her claim as against the barge L. T. C. No. 38, the ad interim stipulation for value filed on its behalf, the petitioner and its stipulators for value is reduced to the sum of \$150,000;

(c) that she will not increase the amount of either of said claims as against either of the said vessels, as above stated, or the petitioner and its stipulators for value at any future date beyond the amounts so stated;

(d) that she will not enter judgment in any Court in excess of the stipulated amounts of her claims against petitioner as owner of either of said vessels;

(e) that she hereby waives any claim of res judicata relevant to the issue of limited liability with respect to either of said vessels, based on a judgment in any other Court.

[fol. 111] 2. As her unconditional partial release she represents:

(a) that the total amount of all claims filed herein as against the tug Eastern Cities and the petitioner, as her owner, is \$109,525; the total amount of all claims filed herein as against the barge L. T. C. No. 38 and the petitioner, as her owner, is \$159,525;

(b) that in consideration of the entry of an order upon this stipulation, pursuant to the decisions of Honorable Edward Weinfeld, United States District Judge, dated December 29th and 30th, 1955, modifying the injunctive order entered herein October 8th, 1954, to permit the prosecution of her suit in Supreme Court, State of New York, Ulster County, she hereby releases and forever discharges the petitioner, its successors and assigns and the tug Eastern Cities and the barge L. T. C. No. 38 unconditionally but partially to the extent hereinafter described from all causes of action whatsoever, in law, in admiralty or in equity which against them she ever had, now has or which her successors hereafter shall or may have by reason of the death of Robert C. Henn on July 10th, 1954,

resulting from a collision between the motor yacht Blackstone, on which he was a passenger, with the barge L. T. C. No. 38 in tow of the tug Eastern Cities, in the Hudson River; it being the intent and purpose of this release that it be partial to the extent of the difference between the amount of her claim originally filed herein in the sum of \$250,000 and the reduced amount of her claim heretofore, stipulated as against the tug Eastern Cities of \$100,000, so that the amount hereby released as to such tug and the petitioner is \$150,000; and it being the further intent and purpose of this release that it be partial to the extent of the [fol. 112] difference between the amount of her claim originally filed herein in the sum of \$250,000 and the reduced amount of her claim heretofore stipulated as against the barge L. T. C. No. 38 of \$150,000, so that the amount hereby released as to such barge and the petitioner is \$100,000.

3. She consents to, and hereby authorizes her proctors, Rosen & Rosen, to submit an order to the Court for entry and providing:

(a) that she shall be permitted to prosecute her suit in Supreme Court, State of New York, Ulster County only to judgment;

(b) that the injunction of October 8th, 1954; insofar as it enjoins collection of the judgment elsewhere than in this proceeding, shall be continued;

(c) that the Court expressly reserves jurisdiction to reestablish a concourse and to adjudicate the petitioner's right to a limitation in the event that the funds should ultimately prove to be inadequate;

(d) that in no event shall this claimant recover from the fund an amount in excess of her claim as reduced by the partial releases heretofore given until all other claims have been satisfied in full;

(e) that the Court further retains jurisdiction of this proceeding against the event that petitioner's right to limit liability of either the tug Eastern Cities or barge L. T. C. No. 38 should be questioned in any other forum.

In witness whereof, I have hereunto set my hand and seal, as the Administratrix of the Estate of Robert C. [fol. 113] Henn, deceased, the 7th day of January in the year One Thousand Nine Hundred and Fifty-six.

Lillian M. Henn, L. S., Administratrix of the Estate of Robert C. Henn, deceased.

(Verified on January 7, 1956, by Lillian M. Henn,
as claimant.)"

HINCKS, *Circuit Judge* (dissenting):

My brothers say: "We must regard this case just as if it comprised two separate limitation proceedings. On that basis, we affirm." Even if I agreed that this treatment of the situation is correct, I should still be constrained to dissent. For on that basis, in the tug proceeding the claimant's claim is for damages caused by the tug in the amount as reduced by stipulation, of \$100,000, and the owner's liability depends on the fault of the tug; in the barge proceeding the claim is for damages caused by the barge in the reduced amount of \$150,000, and the owner's liability depends on the fault of the barge.

Such being the situation, suppose the state court on a general verdict enters judgment in favor of the claimant in excess of \$100,000. What possible effect can such a judgment have? It appears to me that it would be wholly uncollectible in either limitation proceeding. Under the amendment of the order below required by the court's opinion, the claimant will be enjoined "from collecting such excess." Under an original provision of the order, the claimant is enjoined from all collection "of the judgment elsewhere than in this [the limitation] proceeding." The general judgment will not be *res judicata* on the issue of liability in the tug proceedings; it does not import a [fol. 114] finding of fault by the tug. Likewise, in the barge proceedings; it does not import a finding of fault in the barge. Thus, notwithstanding the judgment, the issue of liability will be open in both proceedings.

Or suppose that in the state court the claimant obtains a judgment on a general verdict in an amount say of

\$5000 and being disappointed in the amount thereof decides to press her claims in the limitation proceedings. On no theory of *res judicata* or collateral estoppel can the owner use the state court judgment as decisive on the issues. It will not bar prosecution of the claim in the tug proceedings, because it did not adjudicate that the tug was not at fault. And so in the barge proceedings. The limitation court, perhaps after all the other claims have been heard and adjudicated, will have to hold a full-fledged trial for its determination of the claimant's claim, with a result which may or may not be more satisfactory to the claimant.

Thus considered, the disposition of the court, in my view, subjects the parties to the labor and expense of litigation which well may prove to be wholly fruitless and nugatory.

That such may prove to be the result, I think more than a remote possibility. For that result will follow unless in the state court trial the judge shall require the jury to find specially whether the plaintiff's injury (if caused by the owner's negligence) was caused by negligence in its conduct of the tug or by negligence in the barge. Without special findings, it would be necessary for the jury to determine only whether a proved act of negligence caused the plaintiff's injury. The requirement of special findings will require the jury to determine also whether a proved act of negligence was part of the conduct of a particular vessel,—a determination which under the evidence may involve confusion and difficulty. The plaintiff might prove [fol. 115] an act of negligence and yet fail to prove that the act was a part of the owner's conduct of a particular vessel. In my opinion, it is by no means unlikely that the judge would refuse a request to require special findings on the ground that the request if granted would inject into the case an additional issue the solution of which is not essential to the decision of the case under the law of the state. It may also be observed that if a special verdict were required and claims of error should be predicated on the disposition of that additional issue, the parties would be without the usual remedy by motion or appeal. For it is hardly to be supposed that the trial court or an appellate court would give relief for an error pertaining to an issue

which under the law of the state did not affect the validity of the judgment.

My brothers cite our former decisions in *Texas; Trinidad* and other cases for the proposition that a claimant's choice of forum should be protected and that the Limitation Act does not entitle an owner to a determination in the limitation proceedings of its liability to a multiplicity of claimants growing out of a multiple tort except in cases in which by reason of an inadequate fund a concursus is required. But these cases went no further than to permit litigation at law which would be dispositive,—not litigation which may prove to be nugatory. I think it an unwarranted and undesirable extension of the *Texas* doctrine to sanction procedure whereby two trials, one at law and the other in the limitation proceedings, may be required for a final determination of the issues of a single claim.

I would hold that we have here one proceeding for the limitation of the owner's personal, indivisible, liability to the appellee, among other claimants, on her single indivisible claim. I deprecate sanction for a procedure whereby indivisible causes of actions and indivisible liabilities [fol. 116] may be split and their respective fragments may be litigated in separate proceedings. If, as I think, this is a single limitation proceeding, even though two vessels are involved, the claims concededly exceed the fund which may be fixed, and the *Texas* doctrine is inapplicable.

[fol. 117] IN UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

Present: Hon. Charles E. Clark, Chief Judge, Hon. Jerome N. Frank, Hon. Carroll C. Hincks, Circuit Judges.

In the Matter
of

PETITION OF LAKE TANKERS CORP., ETC.

Appeal from the United States District Court for the
Southern District of New York.

JUDGMENT—April 13, 1956

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is modified in accordance with the opinion of this Court, and, as modified, said order be and it hereby is affirmed; with costs taxed in favor of the appellee.

A. Daniel Fusaro, Clerk.

[fol. 118] [File endorsement omitted.]

[File endorsement omitted.]

[fol. 119] IN UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT, OCTOBER TERM 1955

No. 268

[Title omitted]

PETITION FOR REHEARING—Filed April 27, 1956

Lake Tankers Corporation, appellant, petitioner in this
limitation of liability proceeding, respectfully prays for a

rehearing and reargument of this case for the reasons stated below.

With the filing of this petition appellant is also filing a petition praying that this petition for rehearing be heard and considered in banc by all the judges of this Court who are in active service.

Statement of the Case

Petitioner's tug was push-towing petitioner's barge up the Hudson River when the yacht BLACKSTONE with eleven men on board collided with the barge, capsized and sank. [fol. 120] Ten were rescued but the eleventh has not been found. Suit has been brought in the state court against petitioner for \$500,000 for the death. Petitioner began this limitation proceeding and eleven claims were filed which aggregate \$259,500. Bond was given for the tug in the amount of \$118,500 and, later, for the barge in the amount of \$165,000. The death claimant, appellee on this appeal, then allocated her claim as between tug and barge, \$100,000 to the tug and \$150,000 to the barge, the aggregate of all claims remaining, however, at \$259,500. Appellee then moved to relax the restraining order, and for leave to proceed with her action in the state court, arguing that after her allocation the claims against the tug are less than her value and the claims against the barge are less than her value. Weinfeld, J. granted the motion, petitioner appealed and the panel of this Court that considered the appeal has affirmed, Clark and Frank, C. JJ. for affirmance, Hincks, C. J. dissenting.

REASONS FOR GRANTING THIS PETITION

I. The decision of the majority of the panel sharply conflicts with the rule as laid down by five other recent decisions of this Court.

Quite recently, after considering the question in at least five cases, this Court has evolved a rule governing the circumstances under which claimants in a limitation proceeding may obtain leave to pursue their claims outside the limitation proceeding which may fairly be stated as follows:

Where it is clear that the limitation fund will substantially exceed the aggregate of all possible claims the restraining order will be vacated; otherwise not.

Matter of Trinidad Corporation, 229 F. 2d 423 [Medina and Hincks, C. JJ. and Burke, D. J.]; *George J. Waldie* [fol. 121] *Towing Co. v. Ricca*, 227 F. 2d 900 [Clark, Lumbard and Waterman, C. JJ.]; *Petition of Texas Company*, 213 F. 2d 479 [Chase; Swan and Frank, C. JJ.]; *Petition of Moran Transp. Corp.*, 185 F. 2d 386 [L. Hand, Swan and Frank, C. JJ.]; *Curtis Bay Towing Co. v. Tug Kevin Moran, Inc.*, 159 F. 2d 273 [L. Hand, Chase and Frank, C. JJ.].

In this proceeding the claims aggregate \$259,525 but it cannot be said whether the amount of the limitation fund will be \$118,500 or \$165,000 or \$283,000 until after there has been a trial on the merits. The amount of the fund cannot be determined until after trial on the merits for this reason: Petitioner owned both tug and barge, valued at \$118,500 and \$165,000 respectively. The limitation fund will consist of the value only of the vessel(s) individually at fault *in rem*. *Liverpool etc. Nav. Co. v. Brooklyn Eastern District Terminal*, 251 U. S. 48; *The Transfer No. 21*, 248 Fed. 459 (2 Cir.); *Standard Dredging Co. v. Kristiansen*, 67 F. 2d 548 (2 Cir.), certiorari denied 290 U. S. 704; *Harbor Towing Corp. v. Atlantic Mutual Ins. Co.*, 189 F. 2d 409 (4 Cir.).

Since the amount of the fund cannot be determined until after trial it is not presently possible to say that the fund will exceed the claims and that no concourse will be necessary to distribute an inadequate fund.

Obviously the decision allowing appellee to proceed in the state court is a complete departure from the recently evolved rule above stated.

It is no answer to say that the claims as against the tug have been reduced to an aggregate less than her value and the claims against the barge similarly reduced. There is no claim pending anywhere against either tug or barge. Neither tug nor barge is before this Court as a juristic person. By apportioning her claim as between tug and barge appellee does no more than engage not to claim the value of the barge if she is held without fault, or the value

[fol. 122] of the tug if she is blameless. But this is no concession whatever because it is settled law that if the barge is not individually at fault *in rem* petitioner need not surrender her value; and similarly as to the tug.

Moreover, appellee's supposed concession has no present effect at all. She presently claims that both tug and barge are at fault and the aggregate of her claims as now pending against petitioner and its property is \$250,000. The person against whom the claims are made is the petitioner, Lake Tankers Corporation. Claims asserted to be against its inanimate property, tug and barge, are in truth and in fact claims against petitioner itself, the only juristic person seeking limitation of liability arising out of this collision. The undeniable fact is that, whether allocated to the tug, or the barge, or any other piece of petitioner's property the eleven claims aggregate \$259,500. If proved, these will be paid by petitioner out of its general funds in amounts which substantially exceed the amount at which the limitation fund may be fixed.)

II. The majority erroneously felt constrained to regard this single proceeding as if it comprised two separate proceedings.

The foundation upon which the decision of the majority rests is that they "must" regard this single proceeding as if it were two (p. 1254). The language of the statute, Title 46 U. S. Code §§ 183-189, does not impose the constraint felt by the majority and the opinion does not rely upon the statute. The same is true of the Supreme Court Rules, Admiralty Rules 51-54, Title 28 U. S. Code, Rules, which spell out the procedure with considerable particularity. The majority opinion does not rely upon the rules.

The decision of the majority is unprecedented. No prior decision imposes the constraint felt by the majority [fol. 123] and it cites none. There are numerous cases in which the courts, including this Court, have dealt with limitation petitions by the owner of two or more vessels without feeling any constraint or embarrassment because separate petitions could have been filed. And this is true both in cases where the value of the second vessel has not been

surrendered originally as well as in cases where security has been given for the second vessel but she has not been held liable. *United States v. The Australia Star*, 172 F. 2d 472 (2 Cir.); *Standard Dredging Co. v. Kristiansen*, 67 F. 2d 548 (2 Cir.); *The Transfer No. 21*, 248 Fed. 459 (2 Cir.); *The Bordentown*, 40 Fed. 682 (S. D. N. Y.); *The Captain Jack*, 169 Fed. 455 (D. C. Conn.); *The Alrah H. Boushell*, 38 F. 2d 890 (4 Cir.); *Thompson Towing & Wrecking Ass'n v. McGregor*, 207 Fed. 209 (6 Cir.); *The Columbia*, 73 Fed. 226 (9 Cir.).

Moreover, where the owner of two vessels has sought to obtain limitation but surrendered the value of only one, and where, after trial, the courts have found that faults of both contributed, they have not, in any instance we can find, directed that a separate proceeding be begun. On the contrary, they have either ordered that the value of the second vessel be brought into the pending, single proceeding, *United States v. Australia Star*, *supra*, 172 F. 2d 472 (2 Cir.); *The Alrah H. Boushell*, *supra*, 38 F. 2d 890 (4 Cir.), or they have dismissed the proceeding entirely. *The San Rafael*, 141 Fed. 270 (9 Cir.).

The reason advanced by the majority for feeling the constraint upon which its decision is based is that the owner "could have" instituted separate proceedings in respect of each vessel, from which it concludes that "The owner can not enlarge its rights under the statute by the mere expedient of coupling the two proceedings" (p. 1254). The worst that can be said for petitioner's position is that it had the option to begin a single, or two, proceedings. It exercised its option and began one. That was the [fol. 124] exercise of a clear right under the statute and the rules and such advantages as it may gain from the exercise of its right can not justly be taken away. But there is no question of any enlargement of petitioner's rights. It has the unquestioned right under the statute to petition for limitation of liability and it seeks, if held liable at all, only to do what the statute permits it to do in a proper case, viz. limit its liability to the value of its interest in the vessel or vessels at fault. A solution of the problem is not advanced by referring to the filing of a single petition as a "mere expedient".

Without compulsion by statute, rule or precedent, and

with the slenderest of reasons, the majority of the panel has laid down a rule that will largely emasculate the statute where two or more vessels of single ownership are involved. The majority's approach to statutory construction is diametrically contrary to the instructions given by the Supreme Court to the lower courts. Uniformly and over a period of 75 years the Supreme Court has declared that the statute is to be construed liberally and not grudgingly for the benefit of shipowners. *Norwich Company v. Wright*, 13 Wall (80 U. S.) 104, 121; *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 588-9; *Butler v. Boston and Savannah Steamship Co.*, 130 U. S. 527, 550-1; *Hartford Accident and Indemnity Co. v. Southern Pacific Co.*, 273 U. S. 207, 214-16; *Flink v. Paladini*, 279 U. S. 59, 62-3; *Larsen v. Northland Transportation Co.*, 292 U. S. 20, 24; *Just v. Chambers*, 312 U. S. 383, 385; *Coryell v. Phipps*, 317 U. S. 406, 411; *Maryland Casualty Co. v. Cushing*, 347 U. S. 409, 414. We submit that the majority has wholly overlooked this guidance from the Supreme Court.

Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, affords a close parallel except that the impetus toward separate proceedings came from the state court. A limitation proceeding was brought in New York but one of the claimants insisted upon proceeding with an action in [fol. 125] Massachusetts and the Massachusetts court sustained its position. The Supreme Court, however, held that the very pendency of the limitation proceeding should have stopped the Massachusetts suit. We urge the Court to read again the entire opinion but the following excerpts are particularly significant:

"In these provisions of the statute we have sketched in outline a scheme of laws and regulations for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of it administer it in a spirit of fairness, with the view of giving to ship owners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations

(as before stated) will be of the *last* importance; but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the shipowner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency will also be greatly diminished, if not entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions" (pp. 588-9).

* * *

"Proceedings under the act having been duly instituted in this court, it acquired full jurisdiction of the subject-matter; and having taken such jurisdiction, and procured control of the vessel and freight (or their value), constituting the fund to be distributed, and issued its monition to all parties to appear and present their claims, it became the duty of all courts before which any of such claims were prosecuted, upon being properly certified of the proceedings, to suspend further action upon said claims" (p. 599).

[fol. 126] III. The prosecution of the state court action presents insuperable difficulties and necessarily involves violation of the exclusive admiralty jurisdiction.

The majority say (pages 1254-5) that the State Court suit will not interfere with the exclusive admiralty jurisdiction because there can be no "effective determination by the state court of the value of either vessel." But this observation wholly misses the point. It is not a matter of fixing the dollar value of tug and barge but a matter of determining their liabilities. On the special verdict hypothesis the state court can determine whether petitioner's liability arises from the fault of the tug, or the barge, or both. If such determination is binding it will fix, as between appellee and appellant, the amount of petitioner's limitation fund because that fund is measured by the yardstick of liability of tug or barge or both. But the cases cited at pages 13-16 of our appeal brief demonstrate, and the majority do not deny, that only the Admiralty Court has jurisdiction to fix the amount of the fund. Since the

state court cannot bind the Admiralty Court because the latter has exclusive jurisdiction to determine the amount of the fund it necessarily follows that the whole state court action must be nugatory.

Again, at pages 1255-6, the majority say that the possibility that the Admiralty Court may adjudge the petitioner not liable, while the state court may adjudge otherwise, "will present no difficulty." On the contrary, if the Admiralty Court adjudges no liability petitioner will be entitled to a decree perpetually enjoining all suits against it by any person, including appellee. This presents great difficulty if the state court enters, or attempts to enforce, a judgment.

The same difficulty exists if the Admiralty Court holds only the tug liable. The Court will then fix the tug's value as the limitation fund and perpetually enjoin all persons, [fol. 127] including appellee, from proceeding against petitioner otherwise than against that fund. How can there be "no difficulty" if the state court determines that liability flows from some fault in respect of the barge as well and enters judgment for more than the amount the Admiralty Court fixes as the limit of petitioner's liability? No such decision could possibly stand. The statute expressly provides that, where lack of privity or knowledge is established, the liability of the owner "shall not * * * exceed the amount or value of the interest of such owner in such vessel". Title 46 U. S. Code § 183(a). But if the jury finds liability on the part of both tug and barge and awards the \$250,000 claimed appellee will seek to issue exception on the judgment against petitioner's bank accounts. Unless enjoined this will certainly result in the vessel owner's paying more than the value of its interest in the tug held at fault by the Admiralty Court, thus nullifying the statute.

Respectfully submitted, Lake Tankers Corporation,
By Eugene Underwood, Attorney.

Dated: New York, N. Y., April 26, 1956.

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded, and that it is not made for the purpose of delay.

Eugene Underwood.

[fol. 128] [File endorsement omitted.]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND
CIRCUIT, OCTOBER TERM, 1955

No. 268

[Title omitted]

PETITION FOR HEARING IN BANC—Filed June 7, 1956

To the Honorable the Judges of the United States Court
of Appeals for the Second Circuit Who Are in Active
Service:

Lake Tankers Corporation, appellant and petitioner in
a proceeding for limitation of liability, has filed its petition
for re-hearing and in this petition, addressed to all the
judges of this Court who are in active service, prays that
its appeal be heard and determined in banc.

Reasons for Granting this Petition

Quite recently, after considering the question in at least
five cases, this Court has evolved a rule governing the cir-
cumstances under which claimants in a limitation proceed-
[fol. 129] ing may obtain leave to pursue their claims out-
side the limitation proceeding which may fairly be stated
as follows:

Where it is clear that the limitation fund will
substantially exceed the aggregate of all possible
claims the restraining order will be vacated; other-
wise not.

Matter of Trinidad Corporation, 229 F. 423 [Medina and
Hincks, C. JJ. and Burke, D. J.]; *George J. Waldie Towing
Co. v. Ricca*, 227 F. 2d 900 [Clark, Lumbard and Waterman,
C. JJ.]; *Petition of Texas Company*, 213 F. 2d 479 [Chase,
Swan and Frank, C. JJ.]; *Petition of Moran Transp. Corp.*,
185 F. 2d 386 [L. Hand, Swan and Frank, C. JJ.]; *Curtis
Bay Towing Co. v. Tug Kevin Moran, Inc.*, 159 F. 2d 273
[L. Hand, Chase and Frank, C. JJ.]..

In the instant case a majority of the panel (Clark and Frank, C. JJ., with Hincks, C. J., dissenting) affirmed a District Court order vacating the restraining order on behalf of one of eleven claimants in the proceeding where the claims aggregate \$259,525 but it can not be said whether the amount of the limitation fund will be \$118,500 or \$165,000 or \$283,000 until after there has been a trial on the merits. The amount of the fund can not be determined until after trial on the merits for this reason: Petitioner owned both tug and barge, valued at \$118,500 and \$165,000 respectively. The limitation fund will consist of the value only of the vessel(s) individually at fault *in rem. Liverpool etc. Nav. Co. v. Brooklyn Eastern District Terminal*, 251 U.S. 48; *The Transfer No. 21*, 248 Fed. 459 (2 Cir.); *Standard Dredging Co. v. Kristiansen*, 67 F. 548 (2 Cir.), certiorari denied 290 U. S. 704; *Harbor Towing Corp. v. Atlantic Mutual Ins. Co.*, 189 F. 2d 409 (4 Cir.).

Since the amount of the fund can not be determined until after trial it is not presently possible to say that the fund will exceed the claims and that no concourse will be necessary to distribute an inadequate fund.

[fol. 130] Obviously the majority of the panel which considered this case has made a complete departure from the recently evolved rule above stated, as Hincks, C. J., demonstrates in his dissent. It is undesirable to have one panel depart so widely and so soon from a rule laid down by others. As urged in our petition for rehearing filed contemporaneously herewith, the majority of the panel has made this departure without reference to the statute, or the Supreme Court rules, or any previously decided case.

Writs of certiorari are granted very sparingly by the Supreme Court and, for practical puposes, this Court is the Court of last resort on admiralty matters. The question involved is of the utmost importance. As the Supreme Court said in a closely analogous situation:

"the present case raises a question of great importance to the practical and successful working of the law, the decision of which, indeed, will determine whether it is to be of any real value * * *." *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 589.

The Power to Pass Upon This Petition Lies With a Majority of the Judges of This Court Who Are in Active Service

Title 28 U. S. Code, § 46 (c), provides:

“(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.”

Although this Court has announced no rule or procedure as to the manner of dealing with petitions for hearings or rehearings in banc there is no doubt that it has the power to [fol. 131] do so. *Western Pacific Railroad Case*, 345 U. S. 247. In that case petitions for rehearing in banc were denied by the panel that had made the original decision without submission to all the judges in active service. The Supreme Court held that this would be a proper procedure if all the judges in active service had delegated the power to consider and determine petitions for rehearings in banc to the original panel but that, absent such a delegation, the power lies in a majority of all the judges in active service. The Supreme Court said:

“But in recognizing the full scope of § 46 (c), the full membership of the court will be mindful, of course, that the statute commits the *en banc* power to the majority of active circuit judges so that a majority always retains the power to revise the procedure and withdraw whatever responsibility may have been delegated to the division (p. 261).”

There having been no announced delegation of the power to the panel we submit that in this Circuit at present the power lies in a majority of all the judges in active service.

And, as stated by the Supreme Court in *Western Pacific*:

“the question of whether a cause should be heard *en banc* is an issue which should be considered sepa-

rate and apart from the question of whether there should be a rehearing by the division" (p. 262).

It is perhaps noteworthy that in *Western Pacific* the Supreme Court said that while the statute does not compel any particular procedure, whatever procedure is adopted should be clearly explained. Following this pronouncement Judge Maris of the Third Circuit announced the procedure there. 14 F. R. D. 91 *et seq.* Every petition for rehearing is circulated to all the active judges.

In the Court of Appeals for the District of Columbia and in the Tenth Circuit petitions for rehearing are also [fol. 132] submitted for consideration to all the active judges (see Chief Judge Stephens' letter, 197 F. 2d at 1020-1; Tenth Circuit Rule 20, ¶ 7; F. C. A. Rules, Chapt. 13).

In the Eighth and Ninth Circuits the power to pass on petitions for hearings in banc has been delegated to the original panel (Eighth Circuit Rules 4 and 15 (c); F. C. A. Rules, Chapt. 11; Ninth Circuit Rule 23; F. C. A. Rules, Chapt. 12).

So far as we can ascertain the practice in the other circuits has not been announced.

Wherefore appellant respectfully prays that its appeal be heard and determined in banc by all the judges of this Court who are in active service.

Lake Tankers Corporation, By Eugene Underwood,
Attorney.

Dated: New York, N. Y., April 26, 1956.

[fol. 133] IN UNITED STATES COURT OF APPEALS

In the Matter of PETITION OF LAKE TANKERS CORP., LILLIAN
M. HENN, ETC., Claimant-Appellee

Before: Clark, Chief Judge, Frank and Hincks, Circuit
Judges.

MEMORANDUM DECISION—Filed June 7, 1956

The petition will be considered by all of the six judges upon the Briefs, appendices, and memoranda of the parties. The court suggests that counsel may find it appropriate to file new briefs restating in succinct form the points they wish to make, with a recitation of what has happened in the case, so that the additional judges now to consider the matter may be able to understand the questions at issue without the necessity of re-examining too many separate documents. Since counsel have exchanged briefs extensively to date, it would seem appropriate that if they now file such new briefs they do so simultaneously within a reasonable time, to be arranged after conference with the Clerk.

[fol. 134] [File endorsement omitted.]

[fol. 135] IN UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT

[Title omitted]

Present: Hon. Charles E. Clark, Chief Judge, Hon. Jerome N. Frank, Hon. Carroll C. Hincks, Circuit Judges.

ORDER ON PETITION FOR REHEARING IN BANC, ETC.—
June 7, 1956

A petition for rehearing having been filed herein by counsel for appellant and a petition for hearing in banc having been submitted by said counsel,

Upon consideration thereof, it is

Ordered that said petition for hearing in banc be filed.
Further ordered that said petition for rehearing will be considered by all six judges of this Court upon the briefs, appendices, and memoranda of the parties.

Further ordered that counsel may file, simultaneously, within a reasonable time, new briefs restating in succinct form the points they wish to make, with a recitation of what has happened in the action.

A. Daniel Fusaro, Clerk.

[fol. 136] [File endorsement omitted.]

[fol. 137] IN UNITED STATES COURT OF APPEALS,
FOR THE SECOND CIRCUIT—October Term, 1955

No. 268

(Petition filed June 7, 1956 Decided August 21, 1956)

Docket No. 23965

Matter of the Petition of LAKE TANKERS CORPORATION for
Exoneration from or Limitation of Liability

Before: Clark, *Chief Judge*, and Frank, Medina, Hincks,
Lumbard, and Waterman, *Circuit Judges*.

On Petition for Rehearing *en banc*.

Burlingham, Hupper & Kennedy, New York City
(Eugene Underwood and H. Barton Williams, New York
City, of counsel), for *Lake Tankers Corporation, petitioner-*
appellant.

Rosen & Rosen, Poughkeepsie, N. Y., and Mahar & Mason,
New York City (Frank C. Mason, New York City, of coun-
sel), for *Lillian M. Henn, claimant-appellee, in opposition*.

[fol. 138] PER CURIAM:

Petition for rehearing *en banc* of our decision, 2 Cir., 232
F. 2d 573, affirming as modified the decision, D. C. S. D.
N. Y., 137 F. Supp. 311, granted. Upon due and further

consideration by the entire court of the appeal on the merits and of the able additional briefs submitted by counsel for the respective parties, we adhere to our original decision, Judges Clark, Frank, Lumbard, and Waterman, concurring, Judges Medina and Hincks dissenting.

[fol. 139] IN UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT

Present: Hon. Charles E. Clark, Chief Judge, Hon. Jerome N. Frank, Hon. Harold R. Medina, Hon. Carroll C. Hincks, Hon. J. Edward Lumbard, Hon. Sterry R. Waterman, *Circuit Judges*.

In the Matter of PETITION OF LAKE TANKERS CORPORATION,
Petitioner-Appellant, LILLIAN M. HENN, Claimant-Appellee.

ORDER GRANTING PETITION FOR A REHEARING EN BANC AND
ADHERING TO OPINION OF APRIL 13, 1956—August 21, 1956.

A petition for a rehearing en banc having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is granted.

Further ordered that the opinion of this court, dated April 13, 1956, be and it hereby is adhered to.

A. Daniel Fusaro, Clerk, by Ralph C. Curcio, Deputy Clerk.

[fol. 140] [File endorsement omitted.]

[fol. 141] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1956

No. 445

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed November 19, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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MICROCARD

TRADE MARK

